



DIGEST OF  
UNITED STATES PRACTICE  
IN INTERNATIONAL LAW

2005





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2005

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*Editor*

Office of the Legal Adviser  
United States Department of State

OXFORD  
UNIVERSITY PRESS



INTERNATIONAL LAW INSTITUTE

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ISBN: 978-0-935328-99-8

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## Preface

I welcome this latest edition of the *Digest of United States Practice in International Law* for the calendar year 2005. It is my hope that practitioners and scholars will find this new edition, tracking developments in the state practice of the United States during an eventful year, to be useful. We are already looking forward to the publication of the next volume, for the calendar year 2006, and to presenting, as well, editions for every subsequent year.

The Institute is very pleased to work with the Office of the Legal Adviser to make the *Digest* available for the use of the international legal community.

Don Wallace, Jr.  
*Chairman*  
*International Law Institute*





## Introduction

I am pleased to introduce the *Digest of United States Practice in International Law* for 2005, the year in which I joined the Department of State as Legal Adviser. The volume reflects the great value the United States places on international law and institutions.

The year included, for example, extensive U.S. engagement in further developing the international framework for protecting against terrorist acts. The United States signed the UN International Convention for the Suppression of Nuclear Terrorism the day it was opened for signature and joined in adoption of the text of amendments to the Convention on the Physical Protection of Nuclear Material and to the UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the related Fixed Platforms Protocol. In this hemisphere, the Inter-American Convention Against Terrorism entered into force for the United States in December.

On another front, the United States became party to the Transnational Organized Crime Convention and its important protocols on trafficking in persons and smuggling of migrants. The United States submitted extensive periodic reports on its implementation of the International Covenant on Civil and Political Rights to the UN Human Rights Committee and of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Committee Against Torture.

U.S. state and federal courts were another focus of continued attention. In February President Bush determined that the United States would discharge its international obligations under the International Court of Justice decision in *Avena* by having State courts “give effect to the decision in accordance with general principles of comity” in cases involving any of the Mexican nationals covered by the decision. In U.S. federal courts, the executive branch ad-

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dressed the proper scope of suits brought under the Alien Tort Statute for “torts in violation of the law of nations,” including the foreign policy implications that such suits may raise when they have little connection to the United States. The United States welcomed agreement on the text of a convention on the enforcement of choice of court agreements and related civil judgments at The Hague Conference in June, an important development in addressing the increasing frequency of conflicts of jurisdiction and controversies as to jurisdiction.

Transnational issues played key roles in an increasingly broader spectrum encompassing challenges such as marine pollution and preservation, communications, law enforcement, and trade disputes. Legal issues related to armed conflict in Afghanistan and Iraq remained prominent, including the protection of civilians and others detained by a party to the conflict as well as particular problems posed by illegitimate combatancy. Elsewhere in the world, the United States engaged with the international community in efforts to contain nuclear proliferation and to preserve and restore peaceful settlements to disputes within and between countries.

The *Digest* reflects the continuing commitment of the Office of the Legal Adviser to provide current information and documentation reflecting our practice in various arenas of international legal endeavor. It remains, in the truest sense, a collaborative undertaking involving the sustained effort of those who work in the Office of the Legal Adviser. For 2005 I want especially to thank Nicole Thornton for drafting Chapter 18 and Anna Conley, formerly a student intern with the Office of the Legal Adviser, who volunteered to draft the international civil litigation section of Chapter 15. Attorneys and paralegals in every office within L contributed to the work reflected here and to the assembling of that material into the current volume. Once again, a very special note of thanks goes to the Department’s Senior Reference Librarian, Legal, Joan Sherer, whose technical assistance is invaluable. Finally, I thank the editor of the Digest Sally Cummins without whom the volume would not exist.

We continue to value our rewarding collaboration with the International Law Institute. The Institute’s Director Professor Don Wallace and editor William Mays again have our sincere thanks for

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their superb support and guidance. We welcome too Oxford University Press as co-publisher of the Digest by agreement with the International Law Institute. We look forward to a long and fruitful relationship with both publishers.

Comments and suggestions from readers are always welcome.

John B. Bellinger, III  
The Legal Adviser  
Department of State



## Note from the Editor

With release of the *Digest of United States Practice in International Law* for calendar year 2005, the new *Digest* series inaugurated in 2000 is complete for the period 1989-2005. *Digest 2006* is expected in autumn 2007, returning publication to the schedule we envisioned at the outset.

I want first to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. Government who made this cooperative venture possible. The contributions of Nicole Thornton, who drafted Chapter 18, and Anna Conley, a former student intern with the Office who drafted the International Civil Litigation section of Chapter 15, were key to its successful completion. As always, I thank our colleagues at the International Law Institute, Director Professor Don Wallace, Jr., and editor William Mays for their valuable support and guidance. We are delighted to be working now also with Oxford University Press under its co-publishing agreement with the Institute.

The 2005 volume continues the organization and general approach adopted with *Digest 2000*. In order to provide broad coverage of significant developments as soon as possible after the end of the covered year, we rely in most cases on the text of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Our general practice is to limit entries in each annual *Digest* to material from the relevant year, leaving it to the reader to check for updates. One exception to this practice is the citation to relevant U.S. Supreme Court decisions released after the end of the year but before the book is in print; discussion of such decisions is deferred to the subsequent volume.

As in previous volumes, our goal is to assure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided specific

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internet cites in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily available elsewhere, we have placed them on the State Department website, at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

Other documents are available from multiple public sources, both in hard copy and from various online services. The decision by the United Nations to make its Official Document System available to the public without charge provides a welcome source for UN-related documents of all types, available at <http://documents.un.org>. The UN's home page at [www.un.org](http://www.un.org) remains a valuable quick source for basic documents such as Security Council and General Assembly resolutions.

A number of U.S. government publications, including the Federal Register, Congressional Record, U.S. Code, Code of Federal Regulations, and Weekly Compilation of Presidential Documents, as well as congressional documents and reports and public laws, are available at [www.access.gpo.gov](http://www.access.gpo.gov). Two particularly useful resources for treaty issues are: Senate Treaty Documents, containing the President's transmittal of treaties to the Senate for advice and consent, with related materials, available at [www.gpoaccess.gov/serialset/cdocuments/index.html](http://www.gpoaccess.gov/serialset/cdocuments/index.html), and Senate Executive Reports, providing among other things the Senate Committee on Foreign Relations reports of treaties to the Senate for vote on advice and consent, available at [www.gpoaccess.gov/serialset/creports/index.html](http://www.gpoaccess.gov/serialset/creports/index.html). In addition, the Library of Congress provides extensive legislative information at <http://thomas.loc.gov>. The U.S. government's official web portal is [www.firstgov.gov](http://www.firstgov.gov), with links to a wide range of government agencies and other sites; the State Department's home page is [www.state.gov](http://www.state.gov).

While court opinions are most readily available through commercial online services and bound volumes, some materials are available through links to individual federal court web sites provided at [www.uscourts.gov/links.html](http://www.uscourts.gov/links.html). The official Supreme Court web site is maintained at [www.supremecourtus.gov](http://www.supremecourtus.gov). Briefs filed in the Supreme Court by the Solicitor General are available at [www.usdoj.gov/osg](http://www.usdoj.gov/osg).

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to scholars and other academics, government lawyers, and private practitioners.

As always, suggestions from readers and users are welcomed.

Sally J. Cummins





## CHAPTER 1

# Nationality, Citizenship and Immigration

### A. NATIONALITY AND CITIZENSHIP

#### Citizenship Status of Child of Foreign Diplomat with U.S. Citizen Mother

In response to a request from a U.S. embassy abroad for guidance in determining the citizenship of a child born in the United States to a foreign diplomat father with full privileges and immunities and to an American citizen mother, the Department stated in a telegram that the child's "citizenship determination has to be made based on the same rules as if he had been born abroad to one U.S. citizen parent." Therefore, if the mother "can document sufficient physical presence in the U.S.," her children "can be documented as U.S. citizens."

### B. PASSPORTS

#### 1. Western Hemisphere Travel Initiative

On April 5, 2005, the Departments of State and Homeland Security announced the Western Hemisphere Travel Initiative "to secure and expedite travel." See *www.state.gov/r/pa/prs/ps/2005/44228.htm*. As described in a media note issued by the Department of State on September 1, 2005, "[t]he Western Hemisphere Travel Initiative will require all U.S. citizens, citizens of the British Overseas Territory of Bermuda, and citizens of Canada and Mexico to have a passport or other

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accepted secure document that establishes the bearer's identity and nationality to enter or re-enter the United States by January 1, 2008." See [www.state.gov/r/pa/prs/ps/2005/52386.htm](http://www.state.gov/r/pa/prs/ps/2005/52386.htm).

Also on September 1, the Federal Register published an advance notice of proposed rulemaking signed by Secretary of State Condoleezza Rice and Secretary of Homeland Security Michael Chertoff explaining the statutory requirement for the new program and alternatives to passports being considered, and requesting public comment. 70 Fed. Reg. 52,037 (Sept. 1, 2005).

Excerpts from the background section of the advance notice, signed August 26, 2005, follow (most footnotes omitted).

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\* \* \* \*

### *Enactment of Intelligence Reform and Terrorism Prevention Act of 2004*

The President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638, on December 17, 2004. The statute obligates the Secretary of Homeland Security to develop and implement a plan to require United States citizens and nationals of certain Western Hemisphere countries to present a passport or other identity and citizenship documents when entering the United States from countries in the Western Hemisphere.<sup>1</sup> As a result of the enactment of section 7209 of IRTPA, the Secretary of Homeland Security, in consultation with the Secretary of State, must develop and implement the plan by January 1, 2008.

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<sup>1</sup> Section 7209 does not apply to Lawful Permanent Residents (LPR), who will continue to be able to enter the United States upon presentation of a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status. Section 211(b) of the INA, 8 U.S.C. 1181(b). It also does not apply to military personnel traveling under orders. Section 284 of INA, 8 U.S.C. 1354.

*Current Entry Requirements for United States Citizens*

In general, under federal law it is “unlawful for any citizen of the United States to depart from or enter \* \* \* the United States unless he bears a valid United States passport.” However, United States citizens now are exempt from the statutory passport requirement when coming from the Western Hemisphere other than from Cuba. Currently, a United States citizen entering the United States from the Western Hemisphere, other than from Cuba, is inspected at the border by a Bureau of Customs and Border Protection (CBP) officer. To lawfully enter the United States, the arriving individual need only satisfy the CBP officer of his or her United States citizenship. In addition to examining whatever documentation the individual submits, the CBP officer may ask for additional identification and proof of citizenship until such time as the CBP officer is satisfied that the entering individual is a United States citizen.

As a result of this procedure, United States citizens arriving from within the Western Hemisphere now may provide other documents in lieu of a passport to satisfy a CBP officer. A driver’s license issued by a state motor vehicle administration or other competent state government authority is the most common form of identity document now accepted at the border. The citizenship documents now accepted at the border include birth certificates issued by a United States jurisdiction, Certificates of Naturalization, and Certificates of Citizenship.

*Current Entry Requirements for Nonimmigrant Aliens*

Currently, each nonimmigrant alien arriving in the United States must present to the CBP officer at the border a valid unexpired passport issued by his or her country of citizenship and a valid unexpired visa issued by a United States embassy or consulate abroad. The only current general exception to the passport requirement applies to the admission of (1) nationals of Canada and Bermuda arriving from anywhere in the Western Hemisphere other than Cuba and (2) Mexican nationals with a Border Crossing Card (BCC) arriving from contiguous territory.

\* \* \* \*

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##### *Travel Document Requirements Under the Intelligence Reform and Terrorism Prevention Act of 2004*

Under section 7209 of IRTPA, both United States citizens and nonimmigrant aliens who currently do not require passports to enter the United States, will require a valid passport or other identity and citizenship document to enter the United States. At that time, United States citizens and nonimmigrant aliens will need to present documents when traveling from countries within the Western Hemisphere to the United States that have not been required in the past. The principal groups affected are United States citizens, Canadian citizens, citizens of the British Overseas Territory of Bermuda, and Mexican citizens. These are the groups currently exempt from the general passport requirement when entering the United States from within the Western Hemisphere. Section 7209 sets January 1, 2008 as the deadline for the development and implementation of the plan relating to the new requirements.

Section 7209 of IRTPA also requires that the Secretaries of Homeland Security and State expedite the travel of frequent travelers, including those who reside in border communities. Section 7209 specifically requires that the Secretaries make readily available a registered traveler program as one means to expedite travel for frequent travelers. DHS currently operates registered traveler programs that benefit United States citizens and foreign nationals entering the United States from Canada and Mexico, such as the Secure Electronic Network for Travelers Rapid Inspection (SENTRI) program and the joint United States-Canadian NEXUS program. In addition, the Free and Secure Trade (FAST) program allows expedited clearance of registered commercial vehicle drivers. DHS will continue to improve and expand travel facilitation programs consistent with the requirements of IRTPA.

According to IRTPA, following the complete implementation of this plan, neither the Secretary of State nor the Secretary of Homeland Security may waive these document requirements for classes of nonimmigrant aliens traveling to the United States.<sup>8</sup> For United States citizens, the new document requirements may be

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<sup>8</sup> Other statutory waiver authority is not affected so that waivers may still be granted in individual cases of unforeseen emergency pursuant to sec-

waived but only in three circumstances specifically spelled out in section 7209: (1) When the Secretary of Homeland Security determines that “alternative documentation” different from that then being required under section 7209 is sufficient; (2) in an individual case of an unforeseen emergency; or (3) in an individual case based on “humanitarian or national interest reasons.”

\* \* \* \*

The Secretary of Homeland Security, in consultation with the Secretary of State, must determine what documents, other than a valid passport, are acceptable under section 7209 because they are “sufficient to denote identity and citizenship.” . . .

\* \* \* \*

While a valid passport will always satisfy IRTPA, DHS is currently considering what other documents may be deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship. Based on the section 7209 requirement that the Secretaries of Homeland Security and State shall seek to expedite the travel of frequent travelers and make readily available a registered traveler program, DHS and DOS expect that NEXUS cards, SENTRI cards, BCCs, and FAST driver identification cards may be accepted in lieu of a passport.

\* \* \* \*

## **2. Information Sharing on Lost and Stolen Passports**

In March 2005 Maura Harty, U.S. Assistant Secretary of State for Consular Affairs, and Rod Smith, First Assistant Secretary, Public Diplomacy, Consular and Passports Division, Australian Department of Foreign Affairs and Trade, signed the Memorandum of Understanding Between the Government of the United States of America and the Government of Australia for the Sharing of Information on Lost and Stolen Pass-

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tion 212(d)(4)(A) of the INA, 8 U.S.C. 1182(d)(4)(A), and pursuant to section 212(d)(4)(C) of the INA, 8 U.S.C. 1182(d)(4)(C), for persons transiting the United States.

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ports (“MOU”) and Annex 1, Agreed Permissible Actions. Articles I and XI explain the purpose of the MOU and its legally non-binding status as follows:

### Article I: Purpose of Memorandum

The purpose of the Memorandum is to establish the conditions under which the United States and Australian Governments intend to make available to each other certain information from their lost and stolen passport databases, including information on both issued and blank passports, to detect and prevent the misuse of those passports.

\* \* \* \*

### Article XI: Status of Memorandum

A. This Memorandum embodies the understanding of the Parties.

It is not governed by international law and does not create legal obligations.

B. The provisions of this Memorandum should not prevent either Party from cooperating or from granting assistance in accordance with the provisions of other applicable international treaties and agreements, national laws and related practices.

Among other issues covered by the MOU, Article IV records the parties’ intention to make available electronically information contained in their lost and stolen passport databases, including passport identification number, issuing authority, type of document, and date of issuance. Articles VI and VII set forth the intentions of the parties concerning authorized uses and protection from unauthorized disclosure of information provided.

### 3. Electronic Passports

Effective October 25, 2005, the Department of State promulgated a final rule amending passport regulations to incorporate changes related to introduction of the electronic passport. 70 Fed. Reg. 61,553 (Oct. 25, 2005). Excerpts below

from the Federal Register address security and privacy issues with the new electronic passports.

\* \* \* \*

Passports must be globally interoperable—that is, they must function the same way at every nation’s border when they are presented. To that end, the International Civil Aviation Organization (ICAO) has developed international specifications for electronic passports that will ensure their security and global interoperability. These specifications prescribe use of contactless smartcard chips and the format for data carried on the chips. They also specify the use of a form of Public Key Infrastructure (PKI) that will permit digital signatures to protect the data from tampering. The United States (U.S.) will follow these international specifications to ensure its electronic passport is globally interoperable.

The Department intends to begin the electronic passport program in December 2005. The first stage will be a pilot program in which the electronic passports will be issued to U.S. Government employees who use Official or Diplomatic passports for government travel. This pilot program will permit a limited number of passports to be issued and field tested prior to the first issuance to the American traveling public, slated for early 2006. By October 2006, all U.S. passports, with the exception of a small number of emergency passports issued by U.S. embassies or consulates, will be electronic passports.

The ICAO specification for use of contactless chip technology requires a minimum capacity of 32 kilobytes (KB). The U.S. has decided to use a 64KB chip to permit adequate storage room in case additional data, or biometric indicators such as fingerprints or iris scans, are included in the future. Before modifying the definition of “electronic passport” to add a new or additional biometric identifier other than a digitized photograph, we will seek public comment through a new rule making process.

The contactless smart chip that is being used in the electronic passport is a “passive chip” that derives its power from the reader that communicates with it. It cannot broadcast personal information because it does not have its own source of power. Readers that

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are on the open market, designed to read Type A or Type B contactless chips complying with International Standards Organization (ISO) 14443 and ISO 7816 specifications, will be able to communicate with the chip. This is necessary to permit nations to procure readers from a variety of vendors, facilitate global interoperability and ensure that the electronic passports are readable at all ports of entry.

The proximity chip technology utilized in the electronic passport is designed to be read with chip readers at ports of entry only when the document is placed within inches of such readers. It uses RFID technology. The ISO 14443 RFID specification permits chips to be read when the electronic passport is placed within approximately ten centimeters of the reader. The reader provides the power to the chip and then an electronic communication between the chip and reader occurs via a transmission of radio waves. The technology is not the same as the vicinity chip RFID technology used for inventory tracking of items from distances at retail stores and warehouses. It will not permit “tracking” of individuals. It will only permit governmental authorities to know that an individual has arrived at a port of entry—which governmental authorities already know from presentation of non-electronic passports—with greater assurance that the person who presents the passport is the legitimate holder of the passport.

The personal information that will be contained in the chip is the information on the data page of the passport—the name, nationality, sex, date of birth, place of birth, and digitized photograph of the passport holder. The chip will also contain information about the passport itself—the passport number, issue date, expiration date, and type of passport. Finally, the chip will contain coding to prevent any digital data from being altered or removed as well as the chip’s unique ID number. This coding will be in the form of a high strength digital signature. The contents of the data page of the traditional passport have been established by international usage and by ICAO. The chip will not contain home addresses, social security numbers, or other information that might facilitate identity theft.



## C. IMMIGRATION AND VISAS

### 1. Grounds for Admission, Inadmissibility, Exclusion, Deportation, Removal of Aliens

#### *a. Classification of certain scientists of the Commonwealth of Independent States of the Former Soviet Union and the Baltic States as employment-based immigrants*

In an interim rule effective May 25, 2005, the Department of Homeland Security implemented changes to the Soviet Scientists Immigration Act of 1992 ("SSIA"), Pub. L. 102-509, amended by the Foreign Relations Authorization Act, FY 2003, Pub. L. 107-228, and requested public comment on the interim rule. 70 Fed. Reg. 21,129 (Apr. 25, 2005). As explained in the summary provided in the Federal Register:

The SSIA, as amended, reinstates the authority to allot visas under section 203(b)(2)(A) of the Immigration and Nationality Act to eligible scientists or engineers of the independent states of the former Soviet Union and the Baltic states with expertise in nuclear, chemical, biological, or other high-technology field or defense projects. This rule amends the Department of Homeland Security (DHS) regulations to codify the new sunset date of September 30, 2006 and the new numerical limit of 950 visas (excluding spouses and children if accompanying or following to join). The rule also modifies the evidence eligible scientists or engineers must submit to establish their expertise or work experience in such high technology fields or defense projects.

The SSIA as originally enacted provided for up to 750 immigrant visas and expired on October 24, 1996. Under Public Law 107-228, any scientist previously admitted for lawful permanent residence is precluded from benefits under the SSIA as amended.

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### ***b. Continued detention for foreign policy reasons***

On March 30, 2005, Rez Ghol Emamipour was removed from the United States to Iran. Emamipour, who entered the United States illegally in 1986, was ordered removed from the United States in 2001; an application for asylum was denied based on a finding that he was a persecutor, as defined under section 208(b)(2)(A)(i) of the Immigration and Nationality Act ("INA") and that his asylum claim was frivolous because he maintained strong ties with the current government of Iran. He was taken into custody in August 2001 but had not been removed because he lacked travel documents to Iran and no third country had agreed to accept him. A Final Decision to Continue Detention, provided to Emamipour on March 4, 2005, by the U.S. Immigration and Customs Enforcement ("ICE"), explained the legal basis for his continued detention as of that date as excerpted below. Shortly after the final decision was issued, Emamipour obtained, from the Iranian Interests Section in Washington, D.C., the necessary travel documents for removal and was removed to Iran.

\* \* \* \*

Your case has been reviewed pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001), and 8 CFR § 241.13. To date, ICE has been unable to obtain travel documents to effectuate your removal to Iran. It is arguable that your removal to Iran does not appear significantly likely in the reasonably foreseeable future. In the interim, ICE is continuing its efforts to remove you to a third country.

However, 8 CFR § 241.14(c) authorizes ICE to continue to detain aliens whose release would pose serious adverse foreign policy consequences for the United States, even if their removal is not reasonably foreseeable. ICE can continue to detain an alien due to serious adverse foreign policy consequences where the Secretary of Homeland Security has certified that: (1) the alien is a person described in section 237(a)(4)(C) of the Immigration and Nationality Act (INA), (2) the alien's release is likely to have serious adverse foreign policy consequences for the United States, and (3) no conditions of release can reasonably be expected to avoid those serious

adverse foreign policy consequences. Additionally, the Secretary of Homeland Security may only make such a certification after consultation with the Department of State and upon the recommendation of the Secretary of State in regard to the first two requirements. *See* 8 CFR § 241.14(c).

In order to determine if your case falls under the requirements set forth in 8 CFR § 241.14(c), DHS requested the assistance of the Department of State and the recommendation of the Secretary of State on January 21, 2005. You were provided an opportunity to submit a written statement and additional information for consideration by the Secretary of State and the Secretary of Homeland Security. The packet you submitted was forwarded, in its entirety, to the Secretary of State for her consideration in making her recommendations. Additionally, the packet was forwarded to the Secretary of Homeland Security for his consideration in the certification process. On February 18, 2005, the Secretary of State determined that your presence in the United States would have potentially serious foreign adverse policy consequences for the purposes of § 237(a)(4)(C) of the INA and that your release from detention will likely have serious adverse foreign policy consequences for the United States. . . . The Secretary of State's determination satisfies the requirements at 8 CFR § 241.14(c)(i) and (ii).

In regard to the third requirement of the regulation at 8 CFR § 241.14(c)(iii), there are no release conditions that could reasonably be expected to avoid the serious adverse foreign policy consequences that would result if you were released from custody. . . . Allowing you to reside in the United States denigrates the importance of redressing the human rights violations perpetrated by the Iranian government and would undermine the United States' engagement with human rights interests in Iran.

\* \* \* \*

In her letter of February 18, 2005, referred to in the final decision, Secretary of State Condoleezza Rice explained her determinations and recommendation as excerpted below. The full texts of the final decision, Secretary Rice's letter, and Department of Homeland Security Secretary Michael Chertoff's certification that Emamipour "is an alien . . . whose release is likely to have serious adverse foreign policy conse-

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quences to the United States, and there are no conditions of release that can reasonably be expected to avoid these serious adverse foreign policy consequences” are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Mr. Emamipour has admitted in his asylum application and during his direct testimony in immigration court that he served as a security officer to high-ranking Iranian government officials. Mr. Emamipour also admitted that he arrested “at least 500 people” and that many of these arrests were based on political and religious reasons.

On many occasions he witnessed the immediate execution of individuals he had arrested. He further admitted shooting 15 to 20 people, killing one, while trying to arrest them. He has testified that the Iranian government sent him to other countries for weapons and guerrilla warfare training, and the skills he acquired were used while he was employed as a security official.

Mr. Emamipour has also allegedly misrepresented his relationship with the Iranian government. During his asylum interview and immigration hearing, Emamipour claimed that he had defected from Iran and had severed all ties with the Iranian government. However, the available information shows that he has, in fact, maintained significant ties with the Iranian government while he has been in the United States. . . .

\* \* \* \*

My determination that Mr. Emamipour’s presence in the United States would have potentially adverse foreign policy consequences for the United States for purposes of Section 237(a)(4)(C) of the Immigration and Nationality Act and that Mr. Emamipour’s release from immigration detention will likely have serious adverse foreign policy consequences for the United States is based on the following considerations:

The promotion of human rights, the rule of law, and holding answerable those who have committed serious human rights abuses, genocide, war crimes or crimes against humanity is a central element

of United States foreign policy. To advance these goals, the United States is committed to denying safe haven to human rights violators in the United States, not only by identifying and locating them, but also by removing them from the United States or preventing their entry. If Mr. Emamipour were released from detention, other countries and perpetrators of human rights violations could conclude that the United States is not serious about barring human rights violators from residing freely in the United States.

The Iranian government has a history of summary executions, disappearances, widespread use of torture and other degrading treatment, reportedly including rape, restricted freedoms of speech, assembly, press, and expression. Women and religious and ethnic minorities also continue to face violence and discrimination. These and many other problems contribute to Iran's extremely poor human rights record.

Although the United States does not maintain diplomatic relations with Iran, the United States continues its multi-faceted effort to press the Iranian government to stop abusing its citizens' human rights.

For example, in the fall of 2004, for a second year in a row, the United States supported a Canadian resolution in the United Nations General Assembly condemning the human rights situation in Iran. The Iran human rights resolution passed in the United Nations General Assembly's 59th Plenary, sending an important signal to the Iranian people that the international community recognizes their suffering and to the Iranian government that dialogue on human rights is no substitute for concrete action to improve its record.

The United States has always supported and has lobbied strongly for passage of resolutions on the Iranian human rights situation at the U.N.'s Commission on Human Rights. Also, Iran has been designated as a "Country of Particular Concern" for five years in a row, in accordance with guidelines set out in the International Religious Freedom Act.

Given our country's strong position on human rights and religious freedom, releasing an individual with Mr. Emamipour's alleged background most certainly undermines United States credibility on human rights in the international foreign policy context.

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Additionally, the United States has a strong foreign policy interest in advancing democracy and the rule of law, and establishing effective institutions in Iran. Under a new special authority granted by Congress in 2004 to provide grants to educational institutions, humanitarian groups, nongovernmental organizations, and individuals inside Iran to support the advancement of democracy and human rights, the United States is supporting programs that document abuses inside Iran. Such projects seek to raise public awareness of accountability and the rule of law in Iran and aim to facilitate a peaceful transition to democratic rule accompanied by measures for redressing past abuses. Allowing Mr. Emamipour, a human rights persecutor, to reside freely in the United States would undermine a central aspect of our engagement with human rights interests in Iran and would denigrate efforts to redress the human rights violations perpetrated by the Iranian government.

The United States has repeatedly expressed its support for the Iranian people in their quest for freedom, democracy and a more transparent and accountable government, and it will continue to do so. If the United States were to release Mr. Emamipour, it would be inconsistent with these efforts, and it would directly and adversely affect U.S. foreign policy.

For the foregoing reasons, unless DHS determines that he can be released subject to conditions that can reasonably be expected to avoid those serious adverse foreign policy consequences, as provided for in 8 C.F.R. 241.14 (c)(1)(iii), I recommend that Mr. Emamipour be held in immigration detention until he can be removed to Iran or to a third country willing to accept him. The Department of State appreciates the importance of finding an acceptable way to end his detention as soon as possible and will continue working with DHS to facilitate his removal. . . .

### 2. Removal to Country Without Functioning Government

On January 12, 2005, the U.S. Supreme Court held that the United States can remove an alien to the country in which he was born even if that country does not have a functioning government and thus has not consented to take him back. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005).

*See also Digest 2004* at 19-20. Keyse G. Jama, a citizen of Somalia, was admitted to the United States as a refugee but was ordered removed in 2000 after being convicted of a crime involving moral turpitude. As explained in the Supreme Court opinion, Jama “declined to designate a country to which he preferred to be removed. The Immigration Judge ordered petitioner removed to Somalia, his country of birth and citizenship.” Jama filed a petition for habeas corpus, alleging that Somalia has no functioning government, that Somalia therefore could not consent in advance to his removal, and that the Government was barred from removing him to Somalia absent such advance consent under 8 U.S.C. § 1231(b)(2)(E). That statute provides that, when the alien does not designate a country, as was the case here, the Secretary of Homeland Security “shall remove” the alien to, among other possibilities, “[t]he country in which the alien was born.” 8 U.S.C. § 1231(b)(2)(E)(iv). Subsection (vii) provides, as a last resort, for removal to “another country whose government will accept the alien into that country.” Excerpts below provide the Supreme Court’s analysis in affirming the Eighth Circuit decision that the statute does not require acceptance by the destination country in this case of removal to the country of birth. (footnotes omitted).

\* \* \* \*

Section 1231(b)(2), which sets out the procedure by which the Attorney General selected petitioner’s destination after removal was ordered, . . . provides four consecutive removal commands. (1) An alien shall be removed to the country of his choice (subparagraphs (A) to (C)), unless one of the conditions eliminating that command is satisfied; (2) otherwise he shall be removed to the country of which he is a citizen (subparagraph (D)), unless one of the conditions eliminating that command is satisfied; (3) otherwise he shall be removed to one of the countries with which he has a lesser connection (clauses (i) to (vi) of subparagraph (E)); or (4) if that is “impracticable, inadvisable or impossible,” he shall be removed to “another country whose government will accept the alien into that country” (clause (vii) of subparagraph (E)).

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Petitioner declined to designate a country of choice, so the first step was inapplicable. Petitioner is a citizen of Somalia, which has not informed the Attorney General of its willingness to receive him (clause (i) of subparagraph (D)), so the Attorney General was not obliged to remove petitioner to Somalia under the second step. The question is whether the Attorney General was precluded from removing petitioner to Somalia under the third step (clause (iv) of subparagraph (E)) because Somalia had not given its consent.

We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest. In all of subparagraph (E), an acceptance requirement appears only in the terminal clause (vii), a clause that the Attorney General may invoke only after he finds that the removal options presented in the other six are “impracticable, inadvisable, or impossible.” Clauses (i) through (vi) come first—in the statute and in the process of selecting a country. And those six clauses contain not a word about acceptance by the destination country; they merely direct that “the Attorney General shall remove the alien” to any one of them.

Effects are attached to nonacceptance throughout the rest of paragraph (2), making the failure to specify any such effect in most of subparagraph (E) conspicuous—and more likely intentional. Subparagraph (C) prescribes the consequence of nonacceptance in the first step of the selection process; subparagraph (D) does the same for the second step; and clause (vii) of subparagraph (E) does the same for the fourth step. With respect to the third step, however, the Attorney General is directed to move on to the fourth step only if it is “impracticable, inadvisable, or impossible to remove the alien to each country described in” the third step. Nonacceptance may surely be one of the factors considered in determining whether removal to a given country is impracticable or inadvisable, but the statute does not give it the dispositive effect petitioner wishes.

\* \* \* \*

. . . It would be a stretch to conclude that merely because Congress expressly directed the Attorney General to obtain consent



when removing an alien to a country with which the alien lacks the ties of citizenship, nativity, previous presence, and so on, Congress must also have *implicitly* required him to obtain advance acceptance from countries with which the alien *does* have such ties. Moreover, if the Attorney General is unable to secure an alien's removal at the third step, all that is left is the last-resort provision allowing removal to a country with which the alien has little or no connection—if a country can be found that will take him. If none exists, the alien is left in the same removable-but-unremovable limbo as the aliens in *Zadvydas v. Davis*, 533 U.S. 678, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001), and *Clark v. Martinez, post*, \_\_\_, 160 L. Ed. 2d 734, 125 S. Ct. 716, and under the rule announced in those cases must presumptively be released into American society after six months. If this is the result that obtains when the country-selection process fails, there is every reason to refrain from reading restrictions into that process that do not clearly appear—particularly restrictions upon the third step, which will often afford the Attorney General his last realistic option for removal.

To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs. Removal decisions, including the selection of a removed alien's destination, “may implicate our relations with foreign powers” and require consideration of “changing political and economic circumstances.” *Mathews v. Diaz*, 426 U.S. 67, 81, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). Congress has already provided a way for the Attorney General to avoid removals that are likely to ruffle diplomatic feathers, or simply to prove futile. At each step in the selection process, he is *empowered* to skip over a country that resists accepting the alien, or a country that has declined to provide assurances that its border guards will allow the alien entry.

Nor is it necessary to infer an acceptance requirement in order to ensure that the Attorney General will give appropriate consideration to conditions in the country of removal. If aliens would face persecution or other mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); relief under an international agreement prohibiting torture, see 8 CFR

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§§ 208.16(c)(4), 208.17(a) (2004); and temporary protected status, 8 U.S.C. § 1254a(a)(1). These individualized determinations strike a better balance between securing the removal of inadmissible aliens and ensuring their humane treatment than does petitioner's suggestion that silence from Mogadishu inevitably portends future mistreatment and justifies declining to remove *anyone* to Somalia.

\* \* \* \*

### 3. Mariel Boat People

On January 12, 2005, the U.S. Supreme Court held that the INA does not authorize the indefinite detention of inadmissible aliens. *Clark v. Suaro Martinez*, 543 U.S. 371 (2005). The decision also addressed a companion case, *Benitez v. Rozos*, No. 03-7434. Suaro Martinez and Benitez both arrived from Cuba in 1980 as part of the Mariel boatlift and were paroled into the United States. Due to their criminal convictions in the United States following parole, both became inadmissible and consequently, by the time they applied, ineligible for legal permanent resident status. The United States subsequently revoked their parole. Both men were placed in immigration custody pursuant to a statute that provides for detaining aliens during removal proceedings, but this statute states that the government "shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). Another statute provides for detention beyond the 90-day removal period in three circumstances: if the alien is (1) inadmissible, (2) removable under specified provisions, or (3) a risk to the community or a flight risk. 8 U.S.C. § 1231(a)(6). Both Benitez and Martinez were held for more than six months pending removal.

In a 7-2 decision, the Supreme Court held that its construction of § 1231(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678 (2001), for removable aliens also applies to inadmissible aliens such as Benitez and Martinez. In *Zadvydas*, the Court interpreted the statute to authorize detention of removable aliens (who had previously been admitted into the United States) only as long as "reasonably necessary" to effectuate their removal. The Court found that the Government had suggested no reason why the

period of time reasonably necessary to effect removal is longer for an inadmissible alien than a removable alien. Thus, the Court held that the six-month presumptive period prescribed in *Zadvydas* applies. Benitez and Martinez had been held for more than six months and their removal to Cuba was not reasonably foreseeable; thus the decision required their release. Excerpts below from the Court's decision explain its conclusion.

\* \* \* \*

An alien arriving in the United States must be inspected by an immigration official, 66 Stat. 198, as amended, 8 U.S.C. § 1225(a)(3), and, unless he is found “clearly and beyond a doubt entitled to be admitted,” must generally undergo removal proceedings to determine admissibility, § 1225(b)(2)(A). Meanwhile the alien may be detained, subject to the Secretary’s discretionary authority to parole him into the country. See 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5 (2004). If, at the conclusion of removal proceedings, the alien is determined to be inadmissible and ordered removed, the law provides that the Secretary of Homeland Security “shall remove the alien from the United States within a period of 90 days,” 8 U.S.C. § 1231(a)(1)(A). These cases concern the Secretary’s authority to continue to detain an inadmissible alien subject to a removal order *after* the 90-day removal period has elapsed.

[I] Sergio Suarez Martinez (respondent in No. 03-878) and Daniel Benitez (petitioner in No. 03-7434) arrived in the United States from Cuba in June 1980 as part of the Mariel boatlift, see *Palma v. Verdeyen*, 676 F.2d 100, 101 (CA4 1982) (describing circumstances of Mariel boatlift), and were paroled into the country pursuant to the Attorney General’s authority under 8 U.S.C. § 1182(d)(5) (fn. omitted). See Pet. for Cert. in No. 03-878, p 7; *Benitez v. Wallis*, 337 F.3d 1289, 1290 (CA11 2003). Until 1996, federal law permitted Cubans who were paroled into the United States to adjust their status to that of lawful permanent resident after one year. See Cuban Refugee Adjustment Act, 80 Stat 1161, as amended, notes following 8 USC § 1255. Neither Martinez nor Benitez qualified for this adjustment, however, because, by the time

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they applied, both men had become inadmissible because of prior criminal convictions in the United States. When Martinez sought adjustment in 1991, he had been convicted of assault with a deadly weapon in Rhode Island and burglary in California, Pet. for Cert. in No. 03-878, at 7; when Benitez sought adjustment in 1985, he had been convicted of grand theft in Florida, 337 F.3d, at 1290. Both men were convicted of additional felonies after their adjustment applications were denied. . . .

\* \* \* \*

[III] Title 8 U.S.C. § 1231(a)(6) provides, in relevant part, as follows:

“An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).”

By its terms, this provision applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk. In *Zadvydas v. Davis*, 533 U.S. 678, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001), the Court interpreted this provision to authorize the Attorney General (now the Secretary) to detain aliens in the second category only as long as “reasonably necessary” to remove them from the country. *Id.*, at 689, 699, 150 L. Ed. 2d 653, 121 S. Ct. 2491. The statute’s use of “may,” the Court said, “suggests discretion,” but “not necessarily . . . unlimited discretion. In that respect, the word ‘may’ is ambiguous.” *Id.*, at 697, 150 L. Ed. 2d 653, 121 S. Ct. 2491. In light of that perceived ambiguity and the “serious constitutional threat” the Court believed to be posed by indefinite detention of aliens who had been admitted to the country, *id.*, at 699, 150 L. Ed. 2d 653, 121 S. Ct. 2491, the Court

interpreted the statute to permit only detention that is related to the statute's "basic purpose [of] effectuating an alien's removal," *id.*, at 696-699, 150 L. Ed. 2d 653, 121 S. Ct. 2491. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized." *Id.*, at 699, 150 L. Ed. 2d 653, 121 S. Ct. 2491. The Court further held that the presumptive period during which the detention of an alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.*, at 701, 150 L. Ed. 2d 653, 121 S. Ct. 2491.

The question presented by these cases, and the question that evoked contradictory answers from the Ninth and Eleventh Circuits, is whether this construction of § 1231(a)(6) that we applied to the second category of aliens covered by the statute applies as well to the first—that is, to the category of aliens "ordered removed who are inadmissible under [§ 1182]." We think the answer must be yes. The operative language of § 1231(a)(6), "may be detained beyond the removal period," applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one. . . .

\* \* \* \*

The Government, joined by the dissent, argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens, such as Martinez and Benitez, who have not been admitted to the United States. Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved. It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern. . . .

\* \* \* \*

The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens

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who cannot be removed. If that is so, Congress can attend to it.<sup>8</sup> But for this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases.

Since the Government has suggested no reason why the period of time reasonably necessary to effect removal is longer for an inadmissible alien, the 6-month presumptive detention period we prescribed in *Zadvydas* applies. See 533 U.S., at 699-701, 150 L. Ed. 2d 653, 121 S. Ct. 2491. Both Martinez and Benitez were detained well beyond six months after their removal orders became final. The Government having brought forward nothing to indicate that a substantial likelihood of removal subsists despite the passage of six months (indeed, it concedes that it is no longer even involved in repatriation negotiations with Cuba); and the District Court in each case having determined that removal to Cuba is not reasonably foreseeable; the petitions for habeas corpus should have been granted. . . .

\* \* \* \*

In January 2005 the United States provided a brief submission to the Inter-American Commission on Human Rights in Case No. 9903, Raphael Ferrer-Mazorra et al., informing the Commission of the Supreme Court decision and stating, as it had in previous submissions, that “the United States does not intend to observe the recommendations” concerning claims related to admissibility and detention of Mariel Cubans issued in the case. The full text of the 2005 submission is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). See

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<sup>8</sup> That Congress has the capacity to do so is demonstrated by its reaction to our decision in *Zadvydas*. Less than four months after the release of our opinion, Congress enacted a statute which expressly authorized continued detention, for a period of six months beyond the removal period (and renewable indefinitely), of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), § 412(a), 115 Stat 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6) (2000 ed., Supp. II))[8 USCS § 1226a(a)(6)].

also *Digest 2001* at 341-46 discussing the U.S. response in the case filed in November 2001; the full text of the response is available at [www.cidh.org/Respuestas/USA.9903.htm](http://www.cidh.org/Respuestas/USA.9903.htm).

#### 4. Expulsion of Aliens

##### *a. International Law Commission report*

On October 25, 2005, Todd Buchwald, Assistant Legal Adviser for United Nations Affairs, addressed the Sixth Committee on Agenda Item 80, Report of the International Law Commission on the Work of its 57th Session—Expulsion of Aliens and Responsibility of International Organizations.

The full text of Mr. Buchwald's statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Report of the International Law Commission is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm). The Report of the Sixth Committee for the relevant session is found in U.N. Doc. A/C.6/60/SR.12, which includes the substance of the U.S. statement at 5, available at <http://documents.un.org>. For excerpts concerning the responsibility of international organizations, see Chapter 7.B.1.

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... In considering how to address the issue of removal of persons from their territories, States must seek to reconcile respecting the delicate balances contained in their national immigration laws and policies, their international legal obligations, consideration of national security concerns and respect for the rule of law.

Mr. Kamto's preliminary report provides an important overview of a range of issues for consideration as the International Law Commission considers how to proceed with the study of this important topic. As a general matter, the report recognizes that careful attention must be paid to the long-recognized sovereign right of states to expel aliens, and the limitations on this right under international and domestic law. We welcome this acknowledgement and would note that efforts to identify the limitations on this right un-

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der international law should focus on those limitations derived from obligations freely assumed by States, particularly under international human rights treaties they have ratified.

The preliminary report identifies an expansive set of issues for consideration by the ILC. As the debate at the 57<sup>th</sup> Session indicated, a number of important issues must be examined with a view to further refining the scope of the study. In this regard, we share the view that the ILC should not address the refusal to deny entry or admission to aliens at the border, that the distinction between aliens who are lawfully present and those who are not should be clearly observed and that issues that are already addressed by other specialized bodies of law and practice (such as the transfer of aliens for law enforcement purposes or issues related to diplomatic personnel) should not be considered by the ILC under this topic.

\* \* \* \*

### ***b. Report of the United States to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights***

The U.S. report to the UN Committee on Human Rights, discussed in Chapter 6.A.2., addressed U.S. implementation of Article 13, "Expulsion of aliens," in paragraphs 206-70. The report is available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm).

## **D. ASYLUM AND REFUGEE STATUS AND RELATED ISSUES**

### **1. Report of the United States to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights**

The U.S. report to the UNCHR, discussed in Chapter 6.A.3., addresses U.S. refugee and asylum policy in its discussion of U.S. implementation of Article 13, "Expulsion of Aliens," in paragraphs 245-70. The report is available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm).



## **2. U.S.-Vietnam Humanitarian Resettlement Initiative**

On November 15, 2005, the U.S. Department of State Office of the Spokesman issued a media note announcing a joint U.S.-Vietnam humanitarian resettlement initiative for certain Vietnamese who were mistreated after the fall of Saigon in 1975 because of their close association with the United States prior to that time. The full text of the announcement, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/56936.htm](http://www.state.gov/r/pa/prs/ps/2005/56936.htm).

\* \* \* \*

The Government of the United States and the Government of the Socialist Republic of Vietnam jointly announce that, taking into consideration the request from the United States Government, the Government of Vietnam expresses its willingness to cooperate with the United States to resolve humanitarian resettlement issues.

This is a limited process to receive new applications from Vietnamese citizens who might have been eligible under three categories of the former Orderly Departure Program for consideration for resettlement to the United States. This process is limited only to those who were unable to apply or who were unable to complete the application process before the Orderly Departure Program closed on September 30, 1994.

The three Orderly Departure Program categories are the HO, U-11 and V-11 subprograms. Persons whose previous Orderly Departure Program applications were denied in the past are not eligible to re-apply for Humanitarian Resettlement. Persons who were previously notified of their ineligibility for former Orderly Departure Program categories are ineligible to re-apply.

\* \* \* \*

### **Access Criteria for Humanitarian Resettlement**

#### **HO category—Former Re-Education Center Detainees:**

a) Vietnamese applicants who spent three or more years in a re-education center as a result of their close association with U.S.

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agencies or organizations to implement United States Government programs and/or policies prior to April 30, 1975; OR

b) Vietnamese applicants:

- who spent at least one year in a re-education center as a result of their close association with the U.S. Government prior to April 30, 1975 and
- who were also trained for any length of time in the United States or its territories under the auspices of the United States Government prior to April 30, 1975; OR

c) Vietnamese applicants:

- who spent at least one year in a re-education center as a result of their close association with the United States Government prior to April 30, 1975 and
- who had been directly employed by the United States Government, a U.S. company or a U.S. organization for at least one year prior to April 30, 1975; OR

d) Widow/widower applicants whose spouse was sent to a re-education center as a result of his/her close association with the United States Government prior to April 30, 1975 and who died while in a re-education center or died within one year after release.

### **U-11 category—Former U.S. Government Employee:**

Direct-hire employees of the United States Government in Vietnam, with a cumulative period of time totaling five or more years verified United States Government employment during the period from January 1, 1963 through April 30, 1975.

### **V-11 category—Former Employees of Private U.S. Companies or Organizations:**

Direct-hire employees of private U.S. companies and/or U.S. organizations, with a cumulative period of time totaling five or more years verified employment during the period from January 1, 1963 through April 30, 1975.

### **Eligible Immediate Family Members:**

An approved applicant's spouse and unmarried children under the age of 21 at the time of application may be included under Humanitarian Resettlement.

**Important Notes:**

1) This Humanitarian Resettlement process is free. Anyone interested in information should receive it directly from the Refugee Resettlement Section at the Consulate General in Ho Chi Minh City. No other person or organization is authorized to provide information or assistance regarding the process or application. We strongly urge that Vietnamese citizens interested in this process not pay any person or organization for advice or assistance.

2) Those seeking Humanitarian Resettlement should understand that not everybody who applies will be approved for resettlement. Being called for an interview or several interviews does not mean that the applicant will be approved for resettlement. An individual approved for resettlement will be given sufficient time to make arrangements regarding employment, residence and personal matters in Vietnam, before departing to the United States. An applicant should not take any actions in such matters until he/she has been notified officially by the U.S. Government of approval for travel to the United States.

3) Applicants should not make any resettlement plans (i.e. selling home, property, resigning job or school, etc.) until official confirmation of their acceptance for resettlement is received in writing from the Consulate General.

4) There is no charge to request information or to apply for the Humanitarian Resettlement process, and all application forms are available free of charge.

5) The U.S. Government does not have any relationship with any private immigration agents or brokers and such agencies should not be consulted.

6) The U.S. Government will verify all documents as necessary. Those who make false claims or submit false documents to the United States Government will be permanently denied admission to the United States.

\* \* \* \*

**Cross References**

*Equal protection rights of aliens, Chapter 6.A.2.*

*Protection of migrants, Chapters 3.B.4. and 6.D.2.c. and 3.*

*Allegations of torture in removal proceedings, Chapter 6.E.1.*



## CHAPTER 2

### Consular and Judicial Assistance and Related Issues

#### A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

##### 1. *Avena* and other Mexican Nationals (*Mexico v. United States*)

On March 31, 2004, the International Court of Justice (“ICJ”) delivered its judgment in *Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128, available at [www.icj-cij.org/icjwww/idocket/imus/imusframe.htm](http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm). See *Digest* 2004 at 37-43. The ICJ held, among other things, that the United States had violated Article 36 of the Vienna Convention by failing to inform 52 Mexican nationals facing the death penalty of their right to have Mexican consular officials notified of their detentions so that consular assistance might have been provided. The ICJ made additional findings with respect to violations of Mexico’s rights under Article 36(1)(a) and (c). *Avena*, ¶ 153(6) and (7). The ICJ found that the appropriate remedy “consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals.” *Id.* at ¶ 153(9). The ICJ envisioned that the required “review and reconsideration” would be judicial in nature and would not be barred by domestic rules of procedural default, so that consideration would be given to the “full weight of the violation of the rights set forth in the Vienna Convention,” and a case-by-case determination made

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as to whether the violation “caused actual prejudice to the defendant in the process of the administration of criminal justice.” *Id.* at ¶¶ 138-141; *see also id.* at ¶¶ 107-114. *See Digest 2004* at 41.

#### **a. Presidential determination**

On February 28, 2005, President George W. Bush determined that “the United States will discharge its international obligations” under the *Avena* decision “by having State courts give effect to the decision in accordance with general principles of comity” in cases involving any of the covered Mexican nationals. The text of the President’s determination, set forth in a memorandum for the Attorney General, follows and is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The United States is a party to the Vienna Convention on Consular Relations (the “Convention”) and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the “interpretation and application” of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

#### **b. Withdrawal from Optional Protocol**

In a letter of March 7, 2005, Secretary of State Condoleezza Rice notified UN Secretary-General Kofi Annan of U.S. withdrawal from the Optional Protocol to the VCCR referred to in

the President's determination. Secretary Rice's letter, available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm), stated:

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.

On March 11, 2005, then National Security Council General Counsel John Bellinger, III, responded to a question for the record submitted by Senator Joseph Biden, Senate Committee on Foreign Relations, concerning the effect of U.S. withdrawal. Mr. Bellinger became the Legal Adviser for the Department of State on April 8, 2005; the question was submitted in connection with his confirmation hearing. Mr. Bellinger's response, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

The United States remains a party to the Convention and remains fully committed to complying with its obligations under the Convention. The United States expects other countries to abide by their international obligations regarding consular notification and access. Given that the large majority of parties to the Convention are not parties to the optional protocol, I do not expect the United States' withdrawal from the optional protocol will affect the practices of other countries with respect to U.S. citizens arrested or detained abroad.

In a subsequent letter, Attorney General Alberto Gonzales reiterated this point and added that the withdrawal action had "no implications for the international legal obligation of the United States to comply with the *Avena* judgment or the President's determination." See letter of April 5, 2005, from U.S. Attorney General Alberto R. Gonzales to state Attorney General Greg Abbott of Texas, also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

**c. Mexican nationals covered by Avena decision in U.S. courts**

**(1) Medellin v. Dretke**

Jose Ernesto Medellin, one of the Mexican nationals covered by the *Avena* decision, was convicted of capital murder in Texas state court for a crime committed in 1993 and sentenced to death. After his conviction and death sentence were affirmed on direct review, Medellin claimed for the first time in his initial application for state habeas corpus relief that state authorities violated Article 36 of the VCCR by failing to provide required information concerning consular assistance following his detention. The state courts denied habeas relief, the district court concluding that Medellin's Vienna Convention claim was procedurally barred and in any event could not be sustained on the merits. In 2004 the U.S. Court of Appeals for the Fifth Circuit denied Medellin's application for a certificate of appealability from a U.S. district court order denying federal habeas relief on his VCCR claim. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). See *Digest 2004* at 44-47. On December 10, 2004, the U.S. Supreme Court granted certiorari to consider whether courts within the United States were required to apply the ICJ's *Avena* decision when invoked by a covered Mexican national, or alternatively, whether *Avena* should be given effect in the interests of international comity and uniform treaty interpretation. *Medellin v. Dretke*, 543 U.S. 1032 (2004).

Following the February 28, 2005, Presidential determination discussed above, on March 24, 2005, Medellin filed a successive state habeas action in the Court of Criminal Appeals of Texas. In his new application for a writ of habeas corpus, Medellin claimed that the President's memorandum and the *Avena* judgment independently required the Texas court to grant review and reconsideration of his consular notification claim.

Because of these developments, and because of threshold procedural barriers that could foreclose the availability of federal habeas corpus relief, on May 23, 2005, the U.S. Supreme Court dismissed the writ of certiorari as improvidently



granted. *Medellin v. Dretke*, 544 U.S. 660 (2005). The Court explained:

We granted certiorari in this case to consider two questions: first, whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider petitioner Jose Medellin's claim for relief under the Vienna Convention on Consular Relations, . . . without regard to procedural default doctrines; and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment. . . . After we granted certiorari, Medellin filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals, relying in part upon a memorandum from President George W. Bush that was issued after we granted certiorari. This state-court proceeding may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding. The merits briefing in this case also has revealed a number of hurdles Medellin must surmount before qualifying for federal habeas relief in this proceeding, based on the resolution of the questions he has presented here. For these reasons we dismiss the writ as improvidently granted. . . .

In footnote 1, the Court stated:

Of course Medellin, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and other Mexican Nationals* (*Mex. v. U.S.*), 2004 I. C. J. No. 128 (Judgment of Mar. 31), unencumbered by the issues that arise from the procedural posture of this action.

On September 2, 2005, at the invitation of the Texas state court, the United States filed a brief as *amicus curiae* providing its views that the President's determination requires the court to "provide review and reconsideration of Medellin's Vienna Convention claim without regard to the doctrine of proce-

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dural default or other state law obstacles.” The U.S. brief also argued that “neither Article 36 [of the VCCR] nor *Avena* gives a foreign national a private, judicially enforceable right to attack his conviction or sentence.” The case, *Ex parte Medellin*, No. AP-75, 207 (Tex. Crim. App. 2005), was pending in the Texas state court at the close of 2005.

The full text of the U.S. brief, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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#### QUESTION PRESENTED

Whether this Court should authorize consideration on the merits of Medellin’s successive application for state habeas corpus relief, either in light of the President’s foreign policy determination that substantive state court “review and reconsideration” of Medellin’s Vienna Convention claim is required in order to comply with the United States’ international treaty obligations, or in light of the decision of the International Court of Justice in *Mexico v. United States (Matter of Avena and Other Mexican Nationals)*, 2004 I.C.J. 128 (Mar. 31, 2004), ordering that Medellin and similarly situated Mexican nationals be given “review and reconsideration” of their Vienna Convention claims without regard for state procedural bars.

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#### ARGUMENT

##### I. THIS COURT MUST PERMIT REVIEW AND RECONSIDERATION OF APPLICANT MEDELLIN’S VIENNA CONVENTION CLAIM

The President has determined that state courts are to give effect to the ICJ’s *Avena* decision in cases filed by the 51 Mexican nationals addressed in that decision. In this case, that Presidential determination requires this Court to provide review and reconsideration of Medellin’s Vienna Convention claim without regard to the doctrine of procedural default or other state law obstacles. By contrast, the *Avena* decision, standing alone, does not provide a source of

law on which Medellín can rely in these proceedings. Medellín's subsequent application for habeas relief should be disposed of in light of those principles.

A. The United States Has An International Legal Obligation To Comply With *Avena* Under The United Nations Charter

The ICJ is an international judicial body created by the United Nations Charter and the Statute of the International Court of Justice. 59 Stat. 1031, 1055 (1945). As the "principal judicial organ of the United Nations" (United Nations Charter, Art. 92, 59 Stat. 1051), the ICJ adjudicates disputes between States that are parties to the United Nations Charter and that have accepted its jurisdiction for purposes of the dispute. Under the Charter, States may resort to the United Nations Security Council—not to the domestic courts of a State that does not comply with an ICJ judgment—to enforce compliance with ICJ judgments. . . . [T]he United States became a party to the Vienna Convention on Consular Relations in 1969. In addition, in 1969, the United States became a party to an Optional Protocol to the Vienna Convention that provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning Compulsory Settlement of Disputes, Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488. Any party to the Optional Protocol may bring such suits before the International Court of Justice against another State party to the Optional Protocol.<sup>1</sup>

Article 36 of the Vienna Convention, which addresses consular notification, access, and assistance, does not provide foreign nationals with a judicially enforceable right that can be asserted to challenge a domestic criminal judgment. This Court has already held as much in accepting the state habeas court's determination

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<sup>1</sup> On March 7, 2005, the United States noticed its withdrawal from the Optional Protocol. See Addendum A-2 (letter of Attorney General Gonzales, dated April 5, 2005). As a consequence, the United States will no longer recognize the jurisdiction of the ICJ to resolve disputes concerning the interpretation and application of the Vienna Convention. The United States' withdrawal from the Optional Protocol does not affect either the international legal obligation of the United States to comply with the *Avena* decision or the efficacy of the President's determination concerning the means of compliance. *Ibid.*

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that Medellín, as a private individual, lacked standing to seek judicial redress for a violation of Article 36's consular notification provisions. See *Ex parte Medellín*, No. 50,191-01 (Tex. Cr. App. 2001), reviewing Cause No. 675430-A (339th Dist. Ct. 2001). The Fifth Circuit has reached this same conclusion as well. See *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001). For reasons elaborated on later . . . , Article 36 therefore cannot justify any claim that an ICJ decision interpreting that provision is, standing alone, entitled to be privately enforced in domestic courts. Nor can the Optional Protocol, which merely operates as a grant of "jurisdiction" to the ICJ over suits brought by other States that are party to the Optional Protocol. The Optional Protocol does not itself commit the United States to comply with a resulting ICJ decision, much less make such a decision privately enforceable in a criminal proceeding by a foreign national.

The source of the United States' obligation to comply with ICJ decisions is instead found in Article 94(1) of the United Nations Charter, which is itself a treaty. 59 Stat. 1051. Article 94(1) provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which is a party." *Ibid.*<sup>2</sup> Article 94(2) further provides that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." *Ibid.* Taken together, Article 94's provisions make clear that, as a party to the *Avena* litigation, the United States has an international obligation to comply with the ICJ's decision in the case. Those provisions further make clear that non-compliance may result in the other party seeking re-

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<sup>2</sup> In describing the international law obligation it imposes, Article 94(1) refers to compliance with the "decision" of the ICJ. The decision does not have force as legal precedent. See ICJ Statute Art. 59 ("The decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."). This brief uses the term "decision" to refer to the portion of the ICJ ruling with which the United States has an international obligation to comply—what in United States practice would be called the judgment. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of the opinion.

course before the Security Council. No provision requires, however, that ICJ decisions be treated as binding law in the domestic courts of party States.

- B. As The Nation's Chief Foreign Policy Officer, The President Had The Authority To Determine That The *Avena* Decision Should Be Enforced In State Courts In Accordance With Principles Of Comity, And That Determination Must Be Honored By This Court

In *Avena*, the ICJ found that the United States had violated the Vienna Convention by not informing 51 Mexican nationals of their rights under Article 36(1)(b) and by not notifying consular authorities of the detention of 49 Mexican nationals, and that it had deprived Mexico of its rights under Article 36(1)(a) and (c) to have access to its nationals and to arrange for legal representation. *Avena*, at ¶ 153(4), (5), (6), and (7). Medellín's case was covered by each of those rulings. The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals, \* \* \* by taking account both of the violation of the rights set forth in Article 36 \* \* \* and of paragraphs 138 to 141 of this Judgment." *Id.* at ¶ 153(9). In paragraphs 138 to 141, the ICJ stated that it considered the "judicial process" the suitable forum for providing review and reconsideration; that review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account"; and that the domestic courts conducting review and reconsideration ascertain "whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." The Executive Branch interprets the decision to place the United States under an international obligation to choose a means for the covered 51 individuals to receive review and reconsideration of their convictions and sentences to determine whether the denial of the Article 36 rights identified by the ICJ caused actual prejudice to the defense either at trial or at sentencing. The President has determined that the United States will dis-

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charge its international obligations under *Avena* by providing review and reconsideration in state courts.

1. The President is “the sole organ of the federal government in the field of international relations.” *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President, through subordinate Executive Branch officials, represents the United States in the United Nations, including before the ICJ and in the Security Council. See 22 U.S.C. 287 (authorizing the President to appoint persons to represent the United States in the United Nations); 22 U.S.C. 287a (persons appointed under Section 287 shall, “at all times, act in accordance with the instructions of the President”). Congress, in enacting the United Nations Participation Act, also expressly anticipated that these officials would—beyond representing the United States—perform “other functions in connection with the participation of the United States in the United Nations” at the direction of the President or his representative to the United Nations. 22 U.S.C. 287(a), (b). In addition, the President enjoys “a degree of independent authority to act” in “foreign affairs.” *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003). Against those background understandings, the United States’ ratification of the United Nations Charter, including its Article 94, implicitly grants the President “the lead role” in determining how to respond to an ICJ decision. *Cf. id.* at 415 (the “President has the lead role \* \* \* in foreign policy”); see also *First Nat’l City Bank v. Banco Nacional de Cuba*, 460 U.S. 759, 767 (1972) (plurality opinion).

In particular circumstances, the President may decide that the United States will not comply with an ICJ decision and, if Security Council enforcement measures are proposed, direct a veto, consistent with the United Nations Charter.<sup>3</sup> Here, however, the President has determined that the foreign policy inter-

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<sup>3</sup> That was the case with respect to the ICJ’s ruling in *Nicaragua v. United States*, 1986 I.C.J. Rep. 14, 146, 25 I.L.M. 1337 (1986) in which the ICJ ruled that the United States was obligated to cease certain activities in Nicaragua and to make reparation to that country for injuries purportedly caused by breaches of customary international law. The United States, which had withdrawn its submission to the ICJ’s jurisdiction and withdrawn from proceedings before the ICJ, refused to recognize the validity of the ICJ’s decision, did not pay reparation to Nicaragua, and subsequently vetoed a United Nations Security Council

ests of the United States in meeting its international obligations and in protecting Americans abroad justify compliance with the ICJ's decision.

Once the President determines to comply with an ICJ decision, the President must then consider the most appropriate means of compliance. In this instance, in light of the paramount interest of the United States in prompt compliance with the ICJ's decision with respect to the 51 named individuals, and the suitability of judicial review as a means of compliance, the President has determined that "the United States will discharge its international obligations \* \* \* by having state courts give effect to the [*Avena*] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Addendum A-3 (Memorandum for the Attorney General, dated Feb. 28, 2005). Under that determination, as one of the 51 covered Mexican nationals, Medellin is entitled to seek "review and reconsideration" of his convictions and sentences in light of the decision of the ICJ in *Avena*, and this Court is required to give effect to the *Avena* decision by providing such review and reconsideration, without regard for state procedural bars that might otherwise prevent consideration of Medellin's Vienna Convention claim on its merits. Because compliance with the ICJ's decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President exercised his constitutional foreign affairs authority and his authority to direct the performance of United States functions in the United Nations to establish that binding federal rule without the need for implementing legislation. Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925). The constitutionally based authority of the President to determine the means by which the United States will implement its international legal obligations has special force as applied to the treat-

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resolution calling for it to comply with the ICJ's judgment. United Nations Security Council: Excerpts from Verbatim Records Discussing I.C.J. Judgment in *Nicaragua v. United States*, 25 I.L.M. 1337, 1352, 1363 (1986).



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ment of aliens in the United States, which is a matter of paramount federal concern and has long been regulated by treaty.<sup>4</sup> A state's application of its criminal law to aliens thus raises concerns that fall uniquely within the scope of federal responsibilities. The President's authority is especially important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas. Under the Constitution, it is the President who—through diplomatic, consular, and other means—protects Americans deprived of liberty abroad. In deciding what actions the United States will take to implement its Vienna Convention obligations and to address the ICJ decision in *Avena*, the President must make delicate and complex calculations—for which he is uniquely suited—taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, the international legal obligations of the United States, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

To the extent that state procedural rules would prevent giving effect to the President's determination that the *Avena* decision should be enforced in accordance with principles of comity, those rules must give way. Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution; connected to the President's role in the ICJ by virtue of the United States' ratification of the United Nations Charter; and authorized by the President's power to direct the performance of functions related to the United Nations, see 22 U.S.C. 287, constitutes "the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2, and represents

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<sup>4</sup> The Department of State's guidance to federal, state, and local law enforcement and other officials on compliance with consular notification and access requirements lists numerous such treaties to which the United States is a party, some dating back to the first half of the 19th Century. See Consular Notification and Access, at 51-57 (1998), <[http://www.travel.state.gov/law/consular/consular\\_744.html](http://www.travel.state.gov/law/consular/consular_744.html)>.



preemptive federal authority, see *United States v. Belmont*, 301 U.S. 324, 331 (1937).<sup>5</sup>

Under the President's determination, this Court is not required to reach any particular outcome, but is instead to evaluate whether the violation of Article 36, independent of any constitutional claim, "caused actual prejudice to [Medellin] in the process of administration of criminal justice," *Avena*, ¶ 121, bearing in mind that "speculative \* \* \* claims of prejudice," *Breard*, 523 U.S. at 377, do not warrant relief. If prejudice were found, a new trial or a new sentencing hearing would be ordered. In contrast, if after providing review and reconsideration, this Court were to conclude that Medellin has failed to demonstrate, in a non-speculative manner, that the Vienna Convention violation—considered on its own merits, independently of any constitutional issues—resulted in "actual prejudice" at either the guilt or penalty phases of his trial, it may deny relief without violating the President's determination or compromising the United States' international legal obligations to comply with the ICJ's *Avena* decision.<sup>6</sup>

2. The President's authority to issue his determination rests not only on his authority to determine how the United States will respond

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<sup>5</sup> As the Court explained in *Belmont*:

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies \* \* \*. And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states \* \* \*. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.

301 U.S. at 331.

<sup>6</sup> In *Avena*, the ICJ was careful not to specify remedies or direct results. The ICJ thus stated that it was "not to be presumed \* \* \* that the partial or total annulment of conviction or sentence provides the necessary or sole" remedy for the Article 36 violations that it found. *Avena*, at ¶ 123. The ICJ further cautioned that its decision did not—as Mexico unsuccessfully urged—mandate imposition of the domestic exclusionary rule in the case of Article 36 violations. *Id.* at ¶ 127. In considering Vienna Convention claims, the federal courts of appeals have uniformly concluded that Article 36 violations, if cognizable at all, may not be remedied through the exclusion of constitutionally obtained evi-

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to an ICJ decision, but also on the President's authority under Article II of the Constitution to manage foreign affairs. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historic gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Assoc. v. Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). In the field of foreign relations, "the President has a degree of independent authority to act." *Garamendi*, 539 U.S. at 414. The President's Article II power over foreign affairs "does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see *Sanitary Dist.*, 266 U.S. at 425-426 (authority of the Attorney General to bring an action in court to secure compliance with a treaty does not require legislation).<sup>7</sup>

Consistent with that understanding, the Supreme Court has repeatedly held that the President has authority to make executive

dence or the dismissal of charges. See, e.g., *United States v. Gamez*, 301 F.3d 1138, 1143-1144 (9th Cir. 2002); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-1282 (11th Cir. 2002); *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001) (collecting cases); *United States v. De La Pava*, 268 F.3d 157, 163-165 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-988 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885-888 (9th Cir. 2000) (en banc); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir. 2000) (en banc). The President's determination would not bar this Court from reaching the same conclusion.

<sup>7</sup> Recognition of a similar independent Executive authority is reflected in the Court's holdings that the judiciary had a "duty" to give effect to the Executive's suggestion of a foreign sovereign's immunity. See, e.g., *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

agreements with other countries to settle claims without ratification by the Senate or approval by Congress. *Garamendi*, 539 U.S. at 415; *Dames & Moore v. Regan*, 453 U.S. at 679, 682–683; *United States v. Pink*, 315 U.S. 203, 223 (1942); *United States v. Belmont*, 301 U.S. at 330–331. The Supreme Court has also held that such agreements preempt conflicting state law. *Garamendi*, 539 U.S. at 416–417, 424 n.14; *Pink*, 315 U.S. at 223, 230–231; *Belmont*, 301 U.S. at 327, 331. As the Court has explained, “[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place. \* \* \* Nor is there any question that there is executive authority to decide what that policy should be.” *Garamendi*, 539 U.S. at 413–414 (internal citations omitted).

That the President’s action under his foreign relations power has domestic legal consequences does not detract from the President’s power to act. To the contrary, as the cases cited above illustrate, the foreign policy-effectuating agreements upheld by the Supreme Court have often displaced domestic legal rules on matters of significant state concern. For example, in *Garamendi*, the Court enjoined enforcement of an otherwise valid state statute that interfered with an international agreement reached by the President to resolve Holocaust-era claims. And, in *Dames & Moore*, the Court upheld a Presidential order suspending claims pending in American courts in order to effectuate the terms of an executive agreement resolving claims between the United States and Iran. In finding these actions to be within the ambit of the President’s foreign affairs powers, the Court relied on both the consistent congressional acquiescence throughout our nation’s history in the exercise of Executive authority to resolve international claims *and* the absence of any congressional disapproval of the particular agreements reached in either of those cases. See *Garamendi*, 539 U.S. at 415, 429; *Dames & Moore*, 453 U.S. at 678–680, 687–688. Assessed against a historical background of congressional acquiescence, the President’s authority to suspend pending legal claims pursuant to an executive order in *Dames & Moore* was “treated as

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a gloss on ‘Executive Power’ vested in the President” by Article II of the Constitution. *Dames & Moore*, 453 U.S. at 686.

The resolution of the present dispute with Mexico that has resulted in adversarial proceedings before the ICJ is of no less concern to United States’ foreign policy interests than the disputes at issue in those cases. “[T]he President possesses considerable independent constitutional authority to act on behalf of the United States on international issues,” *Garamendi*, 539 U.S. at 424 n. 14, and that authority was near its zenith here. With the advice and consent of the Senate, the United States ratified both the United Nations Charter, under which the United States has obligated itself to comply with ICJ decisions, and the Optional Protocol, under which the United States has agreed to submit to the ICJ’s jurisdiction in disputes arising under the Vienna Convention. The President is charged both constitutionally and under the United Nations Participation Act, 22 U.S.C. 287, 287a, with directing all functions connected with the participation of the United States in the United Nations, including the ICJ. The President’s constitutional, statutory, and treaty-based authority in these respects necessarily “includes the power to determine the policy” of the United States concerning compliance with ICJ decisions. Cf. *Pink*, 315 U.S. at 229; see also *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (“Congress’s express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government.”). Indeed, “[u]nless such a power exists,” the President’s constitutional authority to represent the United States in these international bodies “might be thwarted or seriously diluted.” *Pink*, 315 U.S. at 229-230.

In comparison to the “executive agreement” cases, the means chosen by the President to comply with the United States’ international obligations under Article 94 and to resolve its dispute with Mexico over Vienna Convention violations involve only a modest intrusion on state functions. Unlike the suspension of pending court cases in *Dames & Moore*, the instant Presidential determination does not divest this Court of jurisdiction to dispose of Medellín’s claim, nor does it direct this Court to reach a particular result. It requires only that this Court take account of the Vienna Convention violations by state offi-

cials by conducting a prejudice inquiry that is not wholly dissimilar from the prejudice inquiries that this Court routinely conducts in criminal cases. And by charging state courts with the responsibility of conducting the required “review and reconsideration,” the President’s determination respects principles of federal-state comity, under which the responsibility in state cases for record development and fact-finding—including prejudice assessments—is customarily left for the state courts in the first instance. Cf. 28 U.S.C. 2254(e). The limited intrusion into state practice, under the President’s determination, is fully justified to enable review of the State’s own violation of treaty rights in the treatment of an alien defendant. Federal Executive authority would be frustrated, and “serious [international] consequences” would result if Texas laws limiting the availability of habeas relief were allowed to “defeat or alter our foreign policy,” as determined by the President. *Pink*, 315 U.S. at 232.

Just as the President may enter into an executive agreement to resolve a dispute with a foreign government, the President is equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government. To require the President to enter into yet another formal bilateral agreement in order to exercise his power “would hamstring the President in settling international controversies” and weaken this nation’s ability to fulfill its treaty obligations. *Garamendi*, 539 U.S. at 416. Such a limitation would fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve. It would also fail to recognize that obtaining a formal agreement can be a time-consuming process that is ill-suited for occasions when swift action is required. And it would have the perverse effect of assigning to a foreign government veto power over the President’s exercise of his authority over foreign affairs—in this case, over the President’s choice of the means by which the United States will comply with its international obligations under *Avena*.

3. As explained above, the President’s determination is that the *Avena* decision is to be enforced in accordance with principles of comity. Accordingly, this Court is not free to reexamine whether

the ICJ correctly determined the facts or correctly interpreted the Vienna Convention. Under principles of comity, “the merits of the case should not \* \* \* be tried afresh, as on a new trial or an appeal, upon the mere assertion \* \* \* that the judgment was erroneous in law or in fact.” *Hilton v. Guyot*, 159 U.S. 113, 203 (1895). When principles of comity apply, a foreign judgment is given effect without reexamination of the merits of the decision, provided that the court rendering the judgment had jurisdiction, the court was impartial, its procedures satisfied due process, and there is no “special reason why the comity of this nation should not allow it full effect.” *Id.* at 202; see also *Medellin v. Dretke*, 125 S. Ct. at 2094 (Ginsburg, J, concurring) (“It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a ‘let’s see if we agree’ approach is out of order.”). The President’s determination that the ICJ decision is entitled to comity is consistent with those principles.

Further, under the ICJ Statute, ICJ decisions are binding only “between the parties” and “in respect of that particular case.” 59 Stat. 1062. The ICJ’s decision in *Avena* found violations of the Vienna Convention with respect to 51 specific individuals, including Medellin. The President’s determination that judicial review and reconsideration should be afforded in this nation’s courts applies only to the 51 individuals whose rights were determined in the *Avena* case. The scope of the President’s determination is thus consistent with the scope of the ICJ’s decision with respect to each of the individual cases before it.

The President’s determination that domestic courts should provide review and reconsideration under the ICJ’s decision, without prejudice to the judiciary’s power to consider afresh in other cases the underlying treaty-interpretation and application issues subsumed in the ICJ’s rulings, accords with general standards for determining when judgments against the United States are binding in subsequent litigation. Under domestic law, when a party has obtained a final judgment against the United States, that judgment is binding in subsequent litigation between the United States and that party. . . . In contrast, a judgment against the United States obtained by one party does not preclude the United States from relitigating the underlying merits of particular legal theories in actions brought

by or against other parties. . . . Analogous principles here justify the President's decision to give effect to the final decision of the ICJ with respect to the 51 named individuals whose rights under the Vienna Convention were found to be violated, while leaving the government and the courts free to address the underlying merits in other cases.

5.[sic] Because of the President's exercise of authority, this Court is required to review and reconsider Medellín's capital convictions and death sentences to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing, bearing in mind that speculative showings of prejudice are insufficient. *Breard*, 523 U.S. at 377. If actual prejudice were found, a new trial, a new sentencing, or other appropriate relief would be warranted. This Court may not interpose procedural default or other procedural bars to prevent review and reconsideration, as reliance on such procedural doctrines in this case would impermissibly "frustrate the operation of the particular mechanism the President has chosen" to comply with the United States' international legal obligations. *Garamendi*, 539 U.S. at 424.

The holding in *Breard*, 523 U.S. at 375, that the Vienna Convention does not prevent application of procedural default rules to a Vienna Convention claim, is not inconsistent with this conclusion. The President's determination, which means that procedural default rules may not prevent review and reconsideration for the 51 Mexican nationals identified in *Avena*, is not premised on a different interpretation of the Vienna Convention than that adopted in *Breard*. As the Supreme Court stated in *Breard*, not only is it an established principle of international law that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of [a] treaty," but the specific language in Article 36 "that the rights expressed in the [Vienna] Convention itself 'shall be exercised in conformity with the laws and regulations of the receiving State,'" meant that domestic rules of procedural default are applicable to claims raised under the Vienna Convention. *Ibid*. The United States regards the Court's holding in *Breard* as correct and controlling on that issue. Nonetheless, the President has determined that the foreign policy interests of the United States in meeting its international obligations and protect-



ing Americans abroad require the ICJ's decision to be enforced without regard to the merits of the ICJ's interpretation of the Vienna Convention. Just as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President's determination that the *Avena* decision should be given effect.

II. ABSENT THE PRESIDENT'S DETERMINATION,  
NEITHER ARTICLE 36 OF THE VIENNA CONVENTION  
NOR THE ICJ'S AVENA DECISION IS PRIVATELY  
ENFORCEABLE BY APPLICANT MEDELLIN TO  
CHALLENGE HIS CONVICTION OR SENTENCE

In addition to his proper reliance on the President's determination, applicant Medellin contends (Br. 36) that, "[b]ecause the rights conferred by the Vienna Convention are self-executing, and because the United States agreed to submit to binding resolution by the ICJ of disputes concerning the interpretation and application of the Vienna Convention, the *Avena* judgment provides the 'rule of decision' in [his] case without the need for any further executive or legislative action." That is, independent of the President's determination that the United States will comply with the international obligation imposed by Article 94 of the United Nations Charter, Medellin argues this Court must give effect to the *Avena* decision by providing "review and reconsideration" of his otherwise procedurally defaulted Vienna Convention claim. This Court need not reach or resolve these issues if it agrees that the President's determination itself provides sufficient basis for this Court to provide review and reconsideration. If this Court does reach these arguments, however, it should conclude that neither Article 36 nor *Avena* gives a foreign national a private, judicially enforceable right to attack his conviction or sentence.

A. Article 36 Does Not Authorize Private Judicial Enforcement

1. The Supremacy Clause provides that "all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Nonetheless, treaties are negotiated by this country against the background understanding that they do not generally create judicially enforce-



able individual rights. In general, “[a] treaty is primarily a compact between independent nations,” and “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Head Money Cases*, 112 U.S. 580, 598 (1884). When a treaty violation nonetheless occurs, it “becomes the subject of international negotiations and reclamation,” not judicial redress. *Ibid.* See *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) (“The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.”).

Treaties can create judicially enforceable private rights, but since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States v. Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d at 195-196; *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States v. Li*, 206 F.3d 56, 61 (1st Cir. 2000) (en banc).

That background principle applies even when a treaty benefits private individuals. “International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” *Restatement (Third) of the Foreign Relations Law of the United States*, § 907 cmt. a, at 395 (1987) (*Restatement (Third) of Foreign Relations*). For example, in *Argentine Republic v. Amerasia Shipping Co.*, 488 U.S. 428, 442 & n.10 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship “shall be compensated for any loss or damage” in certain circumstances, and the other specified that “[a] belligerent shall indemnify the damage caused by its violation.” The Court explained that the conventions “only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs.” *Id.* at 442. “They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.” *Ibid.* See *Johnson v. Eisentrager*, 339 U.S. 769, 789 & n.14 (1950)

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(protections of the Geneva Convention of July 27, 1929, 47 Stat. 2021, are not judicially enforceable).

2. Article 36(1)(b) of the Vienna Convention specifies that “if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested.” 21 U.S.T. at 101. In addition, “[a]ny communication addressed to the consular post by the person arrested, \* \* \* shall also be forwarded \* \* \* without delay.” *Ibid.* Finally, state authorities “shall inform the person concerned without delay of his rights under [Article 36(1)(b)].” *Ibid.*

Nothing in the Vienna Convention provides that the “rights” specified in Article 36(1)(b) may be privately enforced in a criminal proceeding. See *United States v. Jimenez-Nava*, 243 F.3d at 197. Accordingly, consistent with background principles, the State of the foreign national may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. And if both parties have subscribed to the Optional Protocol, a resolution may be sought from the ICJ. But a foreign national does not have an independent private right to seek to have his conviction or sentence overturned.<sup>8</sup>

Other Vienna Convention clauses reinforce that conclusion. The Vienna Convention’s preamble states that “the purpose of [the] privileges and immunities [created by the treaty] is not to benefit in-

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<sup>8</sup> By its language, purpose, and drafters’ intent, the Vienna Convention is thus fundamentally different from the extradition treaty, with its specialty provision, that was found to confer individually enforceable rights in *United States v. Rauscher*, 119 U.S. 407, 419-424 (1886). As the Supreme Court later explained, the rule of specialty applied by the Court in *Rauscher* had been “implied \* \* \* in the Webster-Ashburton Treaty [on extradition] because of the practice of nations with regard to extradition treaties,” and that “any doubt” concerning a fugitive’s ability to seek judicial enforcement of the treaty-conferred rule of specialty “was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party.” *United States v. Alvarez-Machain*, 504 U.S. 655, 660, 667 (1992). There is no comparable background practice among nations to allow breaches of consular notification requirements to support challenges to criminal convictions and sentences, and, unlike the extradition treaty at issue in *Rauscher*, Article 36’s requirements have never been implemented through congressional legislation.

dividuals, but to ensure the efficient performance of functions by consular posts.” 21 U.S.T. at 79. And the introductory clause to Article 36 states that it was designed “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State.” Those clauses show that “the purpose of Article 36 was to protect a state’s right to care for its nationals.” *De La Pava*, 268 F.3d at 165. The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that “consular officers shall be free to communicate with nationals of the sending State and to have access to them.” The “rights” of foreign nationals are placed underneath, signaling what the introductory clause spells out—that the function of Article 36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state’s right to protect its nationals. Moreover, on a practical level, a foreign national’s rights are necessarily subordinate to, and derivative of, his States’s rights. An individual may ask for consular assistance, but it is entirely up to the foreign government whether to provide it. That [a] State may choose to enter into the Optional Protocol, providing an enforcement mechanism in the form of a suit by the offended State in the ICJ, underscores that the Vienna Convention confers rights on, and envisions enforcement by, States, not individuals.

3. The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding. See *United States v. Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty). The State Department informed the Senate that “[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions.” S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969). The Senate Foreign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that “[t]he Convention does not change or affect present U.S. laws or practice.” *Id.* at 2. And following ratification of the Vienna Convention, the State Department wrote a letter to all 50 governors explaining it would not require “significant departures from the existing practice within the several states of the United States.” See *Li*, 206 F.3d at 64. Those statements would not have been made if the Convention were understood to have given a criminal defen-

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dant a private right to challenge his conviction and sentence on the ground that he was not informed as required by Article 36.

4. The Executive Branch's interpretation of Article 36 "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shoji Am. Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. To the contrary, the United States took the position that Article 36 did not authorize private judicial enforcement both in its Supreme Court brief in this case, Brief for the United States at 18-30, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928), and in its earlier brief in *Breard*, Brief for the United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 371 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). Moreover, the State Department endorsed that same interpretation in answering questions propounded by the First Circuit in the *Li* case. See *Li*, 206 F.3d at 63 (noting the State Department's view that the Vienna Convention "do[es] not create individual rights at all, much less rights susceptible to the [judicial] remedies proposed by appellants").<sup>9</sup>

5. In sum, Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance. See *Jimenez-Nava*, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394 ("we hold that the Vienna Convention does not create a right for a detained foreign national \* \* \* that the federal courts can enforce"); see also *De La Pava*, 268 F.3d at 163-165 (suggesting the same); *Li*, 206 F.3d at 66-68 (Selya, J., concurring).

6. The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, *supra*, at 5. The Vienna Convention is self-executing in the sense that, without any implementing legislation, government officials can provide foreign na-

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<sup>9</sup> The State Department's letter is available at U.S. Dep't of State, Digest of United States Practice in International Law 2000 (last visited Feb. 28, 2005) ch. 2, doc. no. 1, <<http://www.state.gov/documents/organization/7111.doc>>.

tionals with information concerning consular assistance and with access to consular officers and can give effect to provisions that were intended to be judicially enforced, such as those relating to the privileges and immunities of consular officers themselves.<sup>10</sup> But it is an entirely separate question whether Article 36 gives a foreign national a private right to challenge his conviction and sentence on the ground that consular access was denied. *Restatement (Third) of Foreign Relations Law*, § 111 cmt. h (“whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies”). The available evidence shows that Article 36 does not confer such private rights.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the government could sue to vindicate a treaty right in the event of its denial. See *Sanitary Dist. v. United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue “to carry out treaty obligations to a foreign power”; “The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit.”). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. No similar principle confers a general right to enforce treaties on private individuals.

7. The principle that domestic courts should give “respectful consideration” to an international court’s interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and

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<sup>10</sup> See, e.g., *Risk v. Halvorsen*, 10 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention Article 43(1), 21 U.S.T. at 104, because duties were consular functions); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity).

sentence. In *LaGrand* and *Avena*, the ICJ concluded that “Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.” *LaGrand*, 2001 I.C.J. ¶ 77, at 493; *Avena*, ¶ 40. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of [a] foreign national’s Article 36 rights, a State may seek relief from the ICJ.

In *LaGrand*, the ICJ also concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)’s requirement that the laws of the receiving State “must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.” 2001 I.C.J. ¶ 91, at 497-498. That conclusion presupposes either that Article 36(1)’s reference to “rights,” Article 36(2)’s “full effect” requirement, or the two together create an obligation for criminal courts to attach “legal significance” to a violation of Article 36(1) in a criminal proceeding. See *ibid.*; *Avena*, ¶ 113. While the ICJ’s understanding of the Convention’s requirements is entitled to respectful consideration, it is ultimately within the authority of the Supreme Court to provide the definitive interpretation of the meaning of a federal treaty. See *Breard*, 523 U.S. at 375. The “respectful consideration” owed to an ICJ interpretation is also counterbalanced here by the fact that the Executive Branch, whose views on treaty interpretation are entitled to “great weight,” has considered the ICJ’s interpretation and determined that its own longstanding interpretation of the treaty is the correct one. Against this background, the correct reading of Article 36 is that it does not give Medellín a private right to challenge his convictions and sentences on the ground that Article 36 was breached.

#### B. The *Avena* Decision Is Not Privately Enforceable

Medellín contends that, standing alone, the *Avena* decision constitutes a binding rule of federal law that he may privately enforce in this Court. While the United States has an international ob-

ligation to comply with the decision of the ICJ in this case under Article 94 of the United Nations Charter, the text and background of Article 94 make clear that an ICJ decision is not, of its own force, a source of privately enforceable rights in court.

1. Article 94 states that a United Nations member “undertakes to comply” with an ICJ decision. The phrase “undertakes to comply” does not constitute a recognition that an ICJ decision will have immediate legal effect in the domestic courts of a member nation. Instead, it constitutes a commitment on the part of United Nations members to take action to comply with an ICJ decision. Furthermore, because Article 94(1) does not detail the means of compliance with an ICJ decision, it necessarily contemplates that the political branches of member States would have discretion to choose how to comply. If an ICJ decision were subject to immediate private enforcement in the courts of member States it would strip the political branches of that discretion. Likewise, even if a State decides to comply with the decision in a particular case, it retains the option of protecting itself from further decisions based on the legal principles of that case by withdrawing from the Optional Protocol, as the United States has now done. Giving automatic effect to the reasoning of an ICJ decision—for example, by recognizing an individual right on the strength of the *Avena* decision—would rob the political branches of the discretion to limit the effect of a decision to those covered by the decision by withdrawing from the Optional Protocol.

2. Article 94(2) of the United Nations Charter confirms that the Charter does not make ICJ decisions privately enforceable in the courts of member States. It provides that “[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.” 59 Stat. 1051. Article 94(2) envisions that the political branches of a member State may choose not to comply with an ICJ decision, and provides, in that event, recourse to the Security Council is the sole remedy. Private judicial enforcement in domestic courts is incompatible with that enforcement structure.



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3. There is no relevant evidence in the ratification history of the United Nation[s] Charter that ICJ decisions would be judicially enforceable. Instead, the understanding was that ICJ decisions would be subject to enforcement by the Security Council. The Executive Branch expressed that view during consideration of the United Nations Charter.<sup>11</sup> It expressed that view one year later when the Senate considered the declaration accepting compulsory jurisdiction of the ICJ.<sup>12</sup> And Senators expressed that view during debate on accepting compulsory ICJ jurisdiction.<sup>13</sup>

4. The District of Columbia Circuit is the only court of appeals that has addressed the issue, and it has held that ICJ decisions are not privately enforceable. See *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). In that case, various organizations and individuals claimed that they had been harmed by United States' support for the Nicaraguan "contras" in contravention of a determination by the ICJ that such support violated United States treaty and international law obligations and that the United States was accordingly duty-bound to "cease and refrain from all such acts as may constitute breaches of [its] legal obligations." *Id.* at 932, quoting 1986 I.C.J. 14, 149. Even though "[t]he United States' contravention of an ICJ judgment may well violate principles of international law," the court of appeals stated that "those violations are no more subject to challenge by private parties in this court than is the underlying contravention of the ICJ judgment." *Id.* at 934. That court reasoned that "[t]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" *Id.* at 938 (citation omitted). The reasoning in *Committee of United States Citizens Living in Nicaragua* is correct and should be

<sup>11</sup> Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) (statement of Secretary of State Edward R. Stettinius, Jr.) . . . The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings Before the Senate Comm. on Foreign Relations (Senate Hearings) (1945), 79th Cong., 1st Sess. 124-125; 7/10/45 Senate Hearings 286. . . .

<sup>12</sup> A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. On Foreign Relations, 79th Cong., 2d Sess. 142 (1946). . . .

<sup>13</sup> 92 Cong. Rec. 10,694 [and 10,695] (1946). . . .



followed by this Court in rejecting Medellín's claim that the *Avena* decision can be privately enforced on its own terms. Article 94 creates an international obligation on United Nations members to comply with an ICJ decision; it does not empower a private individual to enforce it.<sup>14</sup>

Article 59 of the ICJ Statute, 59 Stat. 1055, provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." That statute reinforces what the United Nations Charter establishes—that the ICJ decision is "binding" in the sense that parties have an international obligation to comply with the decision. It does not provide that the ICJ's "binding" decision is judicially enforceable at the behest of individuals in a State's domestic legal system, independent of authorization by the State's political branches. Indeed, the ICJ statute affirmatively negates the possibility of private judicial enforcement because it makes an ICJ decision binding only "between the parties," and a private individual cannot be a party to an ICJ dispute. Thus, the Vienna Convention, the Optional Protocol, the United Nations Charter, and the ICJ Statute do not either alone or in combination make an ICJ decision, without more, judicially enforceable.

Nor did the ICJ purport to make its *Avena* decision immediately enforceable in United States courts. The ICJ determined that the United States' obligation was "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals." *Avena*, ¶ 153(9) (emphasis added). In arguing that a foreign national can seek free-standing judicial enforcement of the *Avena* decision, Medellín would deprive the political branches of the very choice of means that the ICJ intended for them to have.

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<sup>14</sup> Courts addressing other provisions of the United Nations Charter have also held that they are not judicially enforceable. See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 156 n.24 (2d Cir. 2003) (United Nations Charter is not self-executing); *Frolova v. USSR*, 761 F.2d 370, 374 (7th Cir. 1985) (Articles 55 and 56 of the United Nations Charter are not self-executing); *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. 1981) (United Nations Charter is not self-executing), vacated on other grounds, 457 U.S. 1128 (1982); *Hitai v. INS*, 343 F.2d 466 (2d Cir. 1965) (Article 55 of the United Nations Charter is not self-executing).

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In arguing that the ICJ decision is judicially enforceable in its own right, Medellín places great weight on the accepted understanding that the Vienna Convention is self-executing. That reliance is misplaced for two reasons. First, Medellín mistakenly equates a self-executing treaty with a privately enforceable one. As already discussed, while Article 36 is self-executing in the sense that state authorities are required to observe the terms of the Convention by providing information concerning consular assistance and consular access, without implementing legislation, it does not confer any judicially enforceable private rights.

More fundamentally, even if Article 36 were privately enforceable, that would not make an ICJ decision automatically privately enforceable. The United States' obligation to comply with an ICJ decision does not flow from the Vienna Convention, but from Article 94 of the United Nations Charter. And, as the United States has shown, under Article 94, an ICJ decision is not privately enforceable.

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In Part III of the brief, the United States addressed a specific Texas statutory provision (Article 11.071, Section 5, of the Texas Code of Criminal Procedure) that imposes limitations on the ability of a Texas court to consider claims raised in a "subsequent application" for state habeas corpus relief. Noting that "[t]he proper construction of Section 5 is a state law question" that "is entirely for this Court to determine," the U.S. brief suggested that its language "appears broad enough to accommodate the conclusion that the President's determination" satisfies the requirements of the statute. If the court were to find the requirements of Section 5 not satisfied, however, the state statute would be preempted by federal law:

By contrast, should this Court interpret Section 5 in such a manner that the President's foreign policy determination was not deemed to supply the factual or legal basis for a previously unavailable claim, thereby precluding consideration on the merits of Medellín's Vienna Convention claim, Section 5 would operate in direct contravention of United States foreign policy as determined by the President. In such circumstances, federal law would pre-

empt the operation of Section 5 and require this Court to “review and reconsider[]” Medellín’s convictions and sentences to determine whether he suffered actual, non-speculative prejudice at either trial or sentencing as a result of the Vienna Convention violation that was found to have occurred. See *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331.

(2) *Torres v. State*

On September 6, 2005, the Court of Criminal Appeals of Oklahoma denied post-conviction relief premised on prejudice resulting from failure of consular notification in a case brought by Osbaldo Torres, another of the Mexican nationals covered by *Avena*. *Torres v. State*, 120 P.3d 1184 (Okla. Crim. App., 2005). See also *Digest 2004* at 43-44 for further discussion of the case.

The court noted at the outset that on May 13, 2004, the Governor of Oklahoma “granted Torres clemency and commuted Torres’s death sentences to life without the possibility of parole.” The court explained its denial of relief in these circumstances as follows:

Torres has not shown he was actually prejudiced by the State’s failure to inform him of his rights under the Vienna Convention. Torres has provided ample evidence that the Mexican government takes its consular obligations to its citizens very seriously, particularly when those citizens are capital defendants in another country. . . . All the evidence presented supports the conclusion that consular assistance, in Torres’s particular circumstances, would have focused on obtaining a sentence of less than death. Evidence did not specifically show how consular assistance would have assisted in the guilt phase of the trial. . . . [T]he Governor’s grant of clemency in Torres’s case ensures that Torres is not subject to the death penalty. Any assistance Mexico could have given in this regard has become moot. Torres did not present evidence showing he was prejudiced in the guilt/innocence stage of trial by the Vi-

enna Convention violation. Under these circumstances, Torres is not entitled to relief from his convictions, and has already received relief from his capital sentences.”

## 2. Damage claims against law enforcement officials: *Jogi v. Voges*

On September 27, 2005, the U.S. Court of Appeals for the Seventh Circuit found that Tejpaal S. Jogi, an Indian citizen, could enforce the Vienna Convention in U.S. courts by bringing damages claims against law enforcement officials. *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). As described in a U.S. brief as *amicus curiae* supporting rehearing or rehearing *en banc* in the case:

Tejpaal Jogi is an Indian citizen who pleaded guilty to aggravated battery with a firearm in Champaign County, Illinois, and served six years in prison before he was removed to India. While in prison, Jogi filed a *pro se* complaint against local law enforcement agents and a state prosecutor, seeking compensatory and punitive damages of \$10 million for their alleged failures to inform Jogi pursuant to the Vienna Convention that he could contact the Indian consulate for assistance and/or to contact the consulate on Jogi’s behalf.

The district court dismissed Jogi’s case, but a panel of this Court reversed. The panel held that Jogi has individual rights under Article 36 of the Vienna Convention that are enforceable in a private damages suit in a U.S. court.<sup>1</sup>

In its brief, filed on November 10, 2005, the United States answered in the negative the question presented: “Whether a foreign national may sue domestic law enforcement officials

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<sup>1</sup> The panel also held that the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), confers jurisdiction on a federal court to entertain an alien’s claim for alleged violation of Article 36 of the Vienna Convention. The United States has serious reservations about the panel’s assumption that a violation of Article 36 would constitute a “tort” within the meaning of the ATS. Because that issue is not essential to the court’s holding, however, we have not addressed it in this brief. Our submission in the text—that the Vienna Convention confers no privately enforceable rights nor any private right of action for damages—applies equally whether jurisdiction is asserted under 28 U.S.C. § 1331 or § 1350.

for money damages based on their alleged failure to provide consular notification information pursuant to the Vienna Convention on Consular Relations.” The full text of the brief, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The petition for rehearing in *Jogi* and the writ of certiorari granted in *Sanchez-Llamas v. Oregon*, referenced in the U.S. brief, remained pending at the end of 2005 before the Seventh Circuit and the Supreme Court respectively.

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In the view of the United States, enforcement of the Vienna Convention is carried out through the usual means of diplomatic negotiation and political intercession. Congress has enacted no law to implement the Convention through a private right of action for damages. The panel nevertheless held that the Vienna Convention’s consular notification provision creates rights that are enforceable by individuals through tort actions in U.S. courts. The panel’s holding raises two significant legal questions, both of which warrant further review.

The first issue raised is whether the Vienna Convention creates individually enforceable rights. That issue is extremely important, and the Supreme Court has granted certiorari to address it. *See Sanchez-Llamas v. Oregon*, No. 04-10566 (U.S. cert. granted Nov. 7, 2005), and *Bustillo v. Johnson*, No. 05-51 (U.S. cert. granted Nov. 7, 2005). This Court’s further review of the issue is also appropriate.

This litigation raises a second and independent question whether any individual rights created by the Vienna Convention may be enforced in a private money damages action against state or local officials. Even if the Convention were interpreted to confer privately enforceable rights, there would be no basis for concluding that it creates a private civil action against law enforcement officials for money damages. This issue also warrants additional review by the Court.

\* \* \* \*

ARGUMENT  
THIS CASE MERITS REHEARING OR  
REVIEW BY THE EN BANC COURT

This case presents two issues of extraordinary importance that merit rehearing by the panel or, in the alternative, review by the full Court. The panel has incorrectly read into the Vienna Convention an implied private right of action for damages to enforce the Convention's provision on consular communications. The panel's decision could have serious ramifications for treaty enforcement and, more broadly, our nation's foreign relations. The holding could also harm state and local law enforcement. Further review is needed to protect these crucial interests.

1. It is the longstanding and firm position of the United States that Article 36 of the Vienna Convention may not be enforced in a money damages action brought by an aggrieved individual in a U.S. court.\*

\* \* \* \*

... [E]ven if the Vienna Convention created an individual right to consular notification that could be enforced in a U.S. court in some circumstances, there would be no basis for implying a monetary damages remedy. In determining whether an Act of Congress confers a private right of action for damages, the Court must find an intent "to create not just a private right, but also a private *remedy*." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Similarly, the creation of a domestic civil cause of action for money damages for violation of a treaty would ordinarily be for Congress, in enacting a law necessary and proper to carry a treaty into effect. *Cf. Missouri v. Holland*, 252 U.S. 416, 432 (1920). For a treaty to have the unusual effect of creating a private damages remedy without an implementing Act of Congress, it would need to do so with a high degree of clarity, if not explicitly. The Vienna Convention does no such thing. Nor can a private right of action for damages be inferred from the history of its Senate consideration, which suggests only that the Convention was understood to impose legal obliga-

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\* Editor's note: See excerpts above from brief in *Medellin* for argument that Article 36 is not privately enforceable by detained foreign nationals.

tions on U.S. officials with custody over nationals of signatory States without the need for further implementing legislation by Congress, and to that extent was “self-executing.” There is no evidence in the history that the Convention was understood or intended to create a private right of enforcement through a civil damages suit.<sup>2</sup>

\* \* \* \*

3. The panel’s decision could have substantive adverse consequences that warrant rehearing or review en banc.

Private judicial enforcement of the Vienna Convention, especially through civil suits for money damages, threatens an avalanche of legal claims against law enforcement officials. Individual agents will be subjected to the burden and expense of defending against civil damages lawsuits. Government officials will be forced to divert scarce resources to litigate the adequacy of information provided to detainees regarding consular notification information under the Vienna Convention, the prejudice caused by any inadequacy, and possible defenses to liability.

The number of potential lawsuits is extremely high, furthermore. The U.S. Census Bureau has estimated that 21 million foreign nationals resided in the United States as of 2004. *See* Table 1.1, at <http://www.census.gov/population/www/socdemo/foreign/pp1-176.html>. Although we are not aware of statistics regarding the number of these foreign nationals subject to detention, in 2004 alone, the U.S. Immigration and Customs Enforcement removed 82,802 criminal aliens—*i.e.*, aliens who had been arrested, charged,

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<sup>2</sup> Far from containing a clear statement of intent to create a novel private damages remedy, the history of Senate consideration of the Vienna Convention indicates that it was intended primarily to replicate existing law. The State Department, in presenting the Convention to the Senate, stated that it does not “overcom[e] Federal or State laws beyond the scope long authorized in existing consular conventions.” S. Exec. Doc. No. 9, 91st Cong., 1st Sess. 18 (1969). The Senate Foreign Relations Committee explained that “[t]he Convention does not change or affect present U.S. laws or practice.” *Id.* at 2. And following approval, the State Department informed governors nationwide that the Convention would not require “significant departures from the existing practice within the several states.” *United States v. Li*, 206 F.3d 56, 64 (1st Cir.), *cert. denied*, 531 U.S. 956 (2000).

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prosecuted, and found guilty of offenses that rendered them statutorily subject to removal. *See* <http://www.ice.gov/graphics/news/newsreleases/articles/droFY04.htm>. Presumably, many more aliens were detained but not removed. Despite the vigorous efforts of the United States government to promote treaty compliance, a substantial number of foreign nationals who have been detained in the United States may not have received information regarding consular notification pursuant to the Vienna Convention, as the result of mistake or ignorance by state or local law enforcement officials. Under the panel's reasoning, each could sue for money damages in a U.S. court.

Nor would the remedy created by the panel decision be limited to foreign nationals detained in this country by U.S. officials. The panel's rationale would also appear to permit individuals to sue foreign officials in U.S. courts for alleged violations of the Vienna Convention's consular notification requirements in foreign countries, with potentially significant consequences for our relations with those foreign governments. In matters of foreign affairs, our Constitution vests the responsibility for speaking on behalf of the nation in the Executive Branch: "There is an elaborate regime of practices and institutions by which the United States and other nations enforce commitments" made in treaties or international agreements, with nations sometimes choosing to forego enforcement of a treaty right "for reasons of prudence, \* \* \* convenience, or \* \* \* to secure advantage in unrelated matters." *Li*, 206 F.3d at 68. For a U.S. court to inject itself into this delicate process, by asserting the right to adjudge and remedy treaty violations, could cause significant harm to our foreign relations. The panel's holding could also lead to inconsistent, non-reciprocal application of the Vienna Convention, since no other country of which we are aware has permitted individual lawsuits for damages based on alleged violation of the Vienna Convention's consular notification rights. For all these reasons, the case merits rehearing by the panel or review by the full Court.



## **B. CHILDREN**

### **1. Parental Child Abduction**

In a number of cases a parent to whom a child is being returned in a parental child abduction case under the Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 1980 U.S.T. 130 ("Hague Abduction Convention") has made undertakings concerning the treatment of the child. An analysis of U.S. practice in this area, prepared by Kathleen Ruckman, Deputy Director, Office of Children's Issues, U.S. Department of State, is excerpted below. The full text is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

Judges in common law countries have incorporated undertakings into return orders under the 1980 Convention since early in its implementation, and their use has become a generally accepted practice. When employed for the limited purpose of ensuring the safety of the child upon return, undertakings promote the purpose of prompt return of a child to its habitual residence. However, the U.S. Central Authority has found that courts in some countries now regularly enter orders including onerous undertakings and pre-conditions to return of children that undermine essential principles of the Convention.

#### **The role of undertakings**

Undertakings are a promise or stipulation to a court offered by, or more often imposed upon, an applicant parent, in which he or she agrees to take certain steps to ensure the short-term welfare of a returning child or parent. The limited use of undertakings provides reassurance to requested courts that return will not be harmful to the child, and that a prompt and fair custody hearing will occur in the requesting country upon return. Commentators and courts in the U.S. and elsewhere have noted that undertakings help promote returns where courts may be otherwise reluctant to order a child returned, especially where a respondent parent has demonstrated some

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risk of harm to the child in the return hearings.<sup>1</sup> Indeed, properly constructed undertakings, voluntarily taken and enforced, can be an important mechanism for overcoming the Article 13(b) defense.

While undertakings are not necessary to the proper operation of the Convention, the U.S. Department of State, Central Authority for the 1980 Convention, supports their limited use where they: (1) are appropriate in scope; (2) facilitate the Article 12 objective of return of the child “forthwith;” (3) help to minimize the issuance of non-return orders based on Article 13; and (4) respect the jurisdictional nature of the Convention by not encroaching on substantive issues relating to custody and maintenance properly left to the court of the habitual residence.<sup>2</sup> Agreements to assist in the return process or to arrange temporary protective measures appropriately facilitate prompt return and are thus seen as reasonable under the Convention.<sup>3</sup>

Additionally, Mr. Michael Nicholls, formerly of the Central Authority for England & Wales, in his report on Hague Convention Operations of November 1995, wisely noted that “[u]ndertakings should be scrutinised with great care to avoid any suggestion of rewarding wrong doing. . . .”<sup>4</sup> In that vein, courts have stated that undertakings should also impose reciprocal obligations on both parents and explicitly terminate upon action by the court of the appropriate jurisdiction.<sup>5</sup>

Mr. Nicholls further suggested that courts first consider alternatives to undertakings that might achieve the desired results, such as seeking “safe harbor” orders in the requesting country.<sup>6</sup> Where enforceability is a primary concern, courts may require “mirror

<sup>1</sup> See P.R. Beaumont & P.E. McEleavy, “The Hague Convention on International Child Abduction” (1999), at 160.

<sup>2</sup> Letter to Mr. Michael Nicholls from Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, U.S. Department of State, August 10, 1995

<sup>3</sup> Id.

<sup>4</sup> Report On Hague Convention Operations by the Lord Chancellor’s Child Abduction Unit, Central Authority for England & Wales, November 1995.

<sup>5</sup> Catherine Brown letter, attached legal memorandum, citing *Zimmermann v. Zimmermann*, District Court of Dallas County (1991), and *Madden v. Hofmann*, [1994] FP 009/478/94

<sup>6</sup> Above, note 4.

orders” in the requesting state, although, this alternative may cause delays and further encroach on the authority of the requesting court.

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## **2. Adoption**

On June 21, 2005, U.S. Assistant Secretary of State for Consular Affairs Maura Harty and Vietnamese Minister of Justice Uong Chu Luu signed the Agreement between the United States of America and the Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children. Vietnam is not a party to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Adoption Convention”), 1870 U.N.T.S. 167 (1995), available at [www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69). Nevertheless, the preamble to the agreement states that the two parties

[d]esir[e] to confirm that the adoption of children who are citizens of one Party, by citizens of the other Party, take place on the basis of respect for the fundamental values and principles of each Country and consistent with the principles of the [Hague Adoption Convention], and, in particular, its provisions on protecting the best interests of children and respect for their fundamental rights, and with a view to preventing the abduction, sale, and trafficking in children and improper financial gain from the adoption process, as well as protecting the rights and interests of adoption parents and birth parents[.]

Article 1 states the purpose of the agreement “to establish a basis of mutual cooperation in the adoption of children between the two countries.” The agreement “is recognized by the Parties as establishing a common understanding regarding intercountry adoptions between the Parties.” The full text is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

In remarks at the signing of the agreement, excerpted below, Assistant Secretary Harty described the U.S. views of the

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adoption relationship with Vietnam. The full text of Ms. Harty's remarks is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The agreement we sign today is an important step toward establishing a transparent adoption system between the United States and Vietnam that reflects our abiding commitment to protecting the interests of orphaned children, their birth parents, and prospective adoptive parents in the United States.

This is only the latest step on a path we have traveled together, both in the United States and in Vietnam, over the last three years. And in some ways it is the first step on a new path: one that will lead to a stronger child welfare and adoption system for orphaned children in Vietnam that respects international principles for inter-country adoptions.

As we move forward to implement this agreement, I know that we also share the goal of achieving Vietnam's accession to the Hague Convention on Intercountry Adoption. The United States strongly supports the Convention because it further safeguards the interests of children, birth parents and adoptive parents. We are working diligently to implement the Hague Convention in the United States and look forward to a day in the near future when we can celebrate Vietnam's accession.

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**Cross Reference**

*Judicial assistance, Chapter 15.C*

## CHAPTER 3

### International Criminal Law

#### A. EXTRADITION, MUTUAL LEGAL ASSISTANCE, AND RELATED ISSUES

##### 1. Treaties

On November 15, 2005, the Senate Foreign Relations Committee held a hearing on four bilateral law enforcement treaties that had been transmitted to the Senate for advice and consent to ratification: an extradition treaty with Great Britain and Northern Ireland, an extradition protocol with Israel, and two mutual legal assistance treaties, with Germany and with Japan. Testimony by Samuel M. Witten, Deputy Legal Adviser, Department of State, is excerpted below. The full text of the testimony is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

For further information on these treaties, see *Digest 2004* at 73-83 (U.S.-U.K. extradition treaty, S. Treaty Doc. No. 108-23 (2004)) and at 93-95 (U.S.-Germany MLAT, S. Treaty Doc. No. 108-27 (2004)); and *Digest 2003* at 143-45 (U.S.-Japan MLAT, S. Treaty Doc. No. 108-12 (2003)). The U.S.-Israel protocol was signed on July 6, 2005, and transmitted to the Senate on September 13, 2005. S. Treaty Doc. No. 109-3 (2005).

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EXTRADITION TREATY WITH GREAT BRITAIN AND  
NORTHERN IRELAND

\* \* \* \*

The treaty before the Senate updates the existing U.S.-UK treaty relationship to make it consistent with virtually all of our modern extradition treaties. It will replace the 1972 extradition treaty and 1985 supplementary treaty that are currently in force between the two countries. Once the treaty is ratified, the United States will be positioned to continue to receive the benefits of several recent changes in UK law, including the reduction in the evidentiary standard that the United States will be required to meet when seeking the extradition of a fugitive from the United Kingdom, thereby making it easier to bring fugitives to justice in the United States. Among other things, the treaty would also streamline the extradition procedures regarding requests to and from UK territories, by enabling U.S. certification of extradition requests to be made in those territories rather than through the United Kingdom's central authority in London.

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The treaty requires that extradition be denied if the competent authority of the Requested State determines that the request is politically motivated. Like all other modern U.S. extradition treaties, the new treaty grants the executive branch rather than the judiciary the authority to determine whether a request is politically motivated. This change makes the new treaty consistent with U.S. practice with respect to every other country with which we have an extradition treaty. Under the new treaty, as under the existing treaty, U.S. courts will continue to assess whether an offense for which extradition has been requested is a political offense.

Another helpful improvement in the proposed treaty deals with the treatment of the statute of limitations. A decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State. This of course does not eliminate the application of the statute of limitations for either the United States or the United Kingdom once a fugitive has been returned. Rather, it reserves the legal determination on the issue of the statute of limitations to the courts of the

country where the criminal charges are pending. This provision is typical of our other modern extradition treaties. Similarly, the treaty has a modern provision on the provisional arrest of fugitives that is typical of our extradition practice and consistent with U.S. law.

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#### EXTRADITION PROTOCOL WITH ISRAEL

The extradition protocol with Israel, signed July 6, 2005, would supplement the 1962 extradition convention currently in force between the United States and Israel. The protocol would update the existing treaty relationship with this very important law enforcement partner in a manner consistent with our modern extradition treaties.

\* \* \* \*

The protocol addresses the issue of extradition of nationals in an innovative way intended to build on important recent advances in Israel's domestic extradition law that make the extradition of nationals possible for Israel under certain circumstances. It repeats the existing convention's requirement that extradition cannot be denied solely on the basis of the nationality of the fugitive. It also provides that if required by its law, the Requested Party may condition the extradition of a national and resident on the assurance that the fugitive shall be returned to serve any sentence of incarceration in the Requested Party. The assurance ceases to have effect if the fugitive consents to serving his sentence in the Requesting Party or refuses to consent or withdraws his consent. The United States and Israel are parties to the Council of Europe Convention on the Transfer of Sentenced Persons, which provides the framework for the transfer of Israeli citizens back to Israel to serve their sentence. Moreover, the protocol requires that Israel enforce, according to its laws, the sentence imposed in the United States, even if that sentence exceeds the maximum penalty for such offense in Israel. Under Israeli law, prisoners are eligible for parole after serving 2/3 of their sentence. A returned fugitive would therefore be eligible for parole once he has served 2/3 of the term of years imposed in the United States.

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### MUTUAL LEGAL ASSISTANCE TREATY WITH GERMANY

The proposed U.S.-Germany Mutual Legal Assistance Treaty in Criminal Matters (MLAT) fills a significant gap in our network of MLATs with major European law enforcement partners. Like other recent MLATs concluded by the United States, the treaty with Germany broadly applies to criminal investigations and proceedings. It enables assistance in connection with investigations by regulatory agencies, for example the Securities and Exchange Commission, to the extent that they may lead to criminal prosecutions. Further, certain antitrust investigations and proceedings, even some types which are considered civil matters under German law, are within the scope of the MLAT.

The MLAT with Germany is typical of our over 50 MLATs with countries around the world, including most of the countries of Europe. It has several innovations, including provisions on special investigative techniques, such as telecommunications surveillance, undercover investigations, and controlled deliveries. It allows certain uses for evidence or information going beyond the particular criminal investigation or proceeding, which can include bilateral assistance to help prevent serious criminal offenses and the averting of substantial danger to public security.

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### MUTUAL LEGAL ASSISTANCE TREATY WITH JAPAN

The United States and Japan signed an MLAT on August 5, 2003. While the United States has similar treaties in force with over 50 countries, this is the first MLAT signed by Japan. With the new proposed treaties with Germany and Japan, the United States has now concluded such treaties with all of our partners in the Group of Eight (G-8).

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There is one aspect of this treaty related to the designation of Central Authorities that should be mentioned. The Central Authority is the entity that performs the functions provided for in the MLAT on behalf of each government. For the United States, the Central Authority is the Attorney General or a designee, a function that has been delegated to the Office of International Affairs in the



Criminal Division of the Department of Justice. For Japan, on the other hand, the Central Authority is either the Minister of Justice or the National Public Safety Commission (the National Police) or their designees. The authorization for Japan to designate two agencies is necessary because of the respective jurisdictions of the two Japanese agencies concerned. The MLAT is accompanied by an exchange of diplomatic notes provided to the Senate for its information that specifies the kinds of mutual legal assistance requests that will be handled by each agency on the Japanese side.

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Testimony by Mary Ellen Warlow, Director of Office of International Affairs, Criminal Division, Department of Justice, noted several additional important factors in the treaties, as excerpted below. The full text of Ms. Warlow's testimony is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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#### The United States-United Kingdom Extradition Treaty

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Another provision in the new treaty of particular significance is that authorizing “temporary surrender.” Under the current treaty, the extradition of an individual who is being prosecuted or serving a sentence in one country must be deferred until the completion of the trial and any sentence imposed. Such a deferral can have disastrous consequences for a later prosecution due to lapse of time, the absence or death of witnesses, and the failure of memory. The new provision will allow the individual being tried or punished in one country to be sent temporarily to the other for purposes of prosecution there and then returned to the first country for resumption of the original trial or sentence. The availability of “temporary surrender” has become more and more significant in recent years as international criminals, including terrorists, transgress the laws of a number of nations to plan and carry out their illegal activities. This particular provision has a very real and practical impact on our ability to successfully prosecute defendants who have violated the

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laws of both nations. We wish to inform the Committee that our government has requested the extradition of a defendant who has been indicted in a major terrorism case here in the United States. However, that defendant currently stands charged with criminal violations in the United Kingdom as well. In this scenario, the establishment of a temporary surrender mechanism through approval of this new treaty is considered vital to ensuring that this defendant—and others similarly situated—ultimately faces trial and is brought to justice in the United States.

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### The United States-Israel Extradition Protocol

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The extradition of Israeli nationals has been problematic for the United States since Israel enacted a 1978 law that conflicted with the Convention and barred the extradition of Israeli citizens. The 1997 case of United States national Samuel Sheinbein who was charged with murder in the State of Maryland, fled to Israel and successfully avoided extradition by claiming Israeli citizenship, highlighted the issue and led to a change in Israel's extradition law. While the Israeli legislation does not entirely eliminate restrictions on the extradition of nationals, it provides a much-improved framework for dealing with fugitives who claim Israeli citizenship. First, offenders are no longer able to avoid extradition by claiming citizenship after committing an offense in the United States; limitations on extradition apply only if the defendant establishes that he was a citizen and resident of Israel at the time of the offense. Second, the limitations on extradition are significantly modified as long as we are able to assure that the defendant will be returned to Israel to serve his sentence, Israeli citizens may be extradited to stand trial. The Protocol accommodates the approach of Israel's legislation.

We have already had experience in several cases utilizing this approach, and found it to be workable. The Council of Europe Convention ("COE Convention") on the Transfer of Sentenced Persons, to which both the United States and Israel are parties, provides the framework for the transfer of Israeli citizens back to Israel to serve their sentences. Specifically, since 1999, the United States

has extradited a total of 20 fugitives from Israel, of whom 15 were Israeli nationals (including dual United States-Israeli nationals). Of those 15 Israelis, following their United States trials we have transferred 5 back to Israel under the COE Convention; 6 are serving their sentences in the United States because Israel determined that they were not residents of Israel at the time of their crimes; 1 was not transferred because his United States sentence was too short to allow for processing and transfer; and 3 cases remain pending in the United States. This approach of permitting extradition of nationals on condition of their return for service of sentence is similar to that in the 1983 United States-Netherlands extradition treaty. However, the Protocol with Israel has the significant additional benefit that Israel has explicitly agreed to enforce the United States sentence, even if it exceeds the maximum penalty under Israeli law.

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Following the hearing, the Departments of State and Justice submitted written responses to questions for the record from members of the committee following the hearing. Several of the questions are addressed in excerpts set forth below. The full text of the responses is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). At the end of 2005 responses to additional questions were being finalized.

The response to a request from Senator Lincoln Chafee for further information related to the U.S.-UK extradition treaty, citing concerns from constituents “stem[ming] from the fear that moving the decision about whether an extradition request is politically motivated from the Judicial to the Executive branch will deny [individuals] their ‘day in court’” follows.

There are two circumstances in which a defendant may assert that a purportedly political aspect of the case against him should bar his extradition.

The first concerns a claim that the offense itself for which extradition is sought is a “political offense.” Under both the current and the new treaty between the United States and the United Kingdom, as well as under all of the U.S. Government’s other extradition treaties, such claims are heard by the judiciary. (“Political of-

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fenses” could include, for example, non-violent speech protesting government action.) Under the current and new treaty with the United Kingdom, serious crimes of violence cannot be considered political offenses.

The second kind of “political” issue that might arise in the context of an extradition case is the “political motivation” issue referred to in the letter. This could be a claim by a fugitive sought for international extradition that he should not be extradited because the foreign government’s decision to charge him or seek his extradition is illegitimate because it is motivated by the requesting country’s desire to punish the person for his political views.

In U.S. practice, the question of “political motivation” is determined by the Secretary of State. This responsibility of the Secretary of State has been recognized by U.S. courts in the longstanding “Rule of Non-Inquiry,” whereby courts defer to the Secretary in evaluating the motivation of the foreign government. This principle recognizes that among the three branches of the U.S. Government, the Executive branch is best equipped to evaluate the motivation of a foreign government in seeking the extradition of an individual. The U.S. Government’s extradition treaties reflect the fact that the U.S. Secretary of State appropriately makes this judgment, and not the U.S. courts.

Indeed, until 1985, the issue of motivation of the Government of the United Kingdom in making an extradition request of the United States was treated the same as in all of our other extradition relationships—the courts played no role in reviewing this issue. In 1985, however, as part of an amendment of other aspects of the UK extradition relationship, the U.S. Senate developed what became Art. 3(a) of the 1972 U.S.-UK extradition treaty, as amended by the 1985 supplementary treaty, which states that extradition “shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.” This

text was added pursuant to the Senate's Resolution regarding advice and consent to the 1985 supplementary treaty.

This anomalous treaty provision has led to long, difficult, and inconclusive litigation in several cases, where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing motivation of a foreign government. The provision for judicial review of political motivation claims has been invoked in five cases, all dating from the early 1990s. Four of these cases involved persons of Irish Catholic background who were convicted of crimes of violence in Northern Ireland, and who escaped from prison in Northern Ireland in 1983 and fled to the United States.

\* \* \* \*

. . . In 2000, the United Kingdom withdrew its request for extradition [in three of the cases], consistent with its announcement that it would not be seeking the extradition of persons who, if they had remained in prison in Northern Ireland, would have benefited from the 1998 early release law.

There are no pending extradition requests from the United Kingdom in connection with the conflict in Northern Ireland.

A question from Senator Richard Lugar requested further information on article 15(3) in the U.S.-Germany mutual legal assistance treaty and whether the executive branch would seek to include similar provisions in future mutual legal assistance treaties.

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- (a) Article 15(3) of the MLAT with Germany permits a Requesting State, without the prior consent of the Requested State, to use evidence or information for certain specified purposes, e.g. "averting substantial danger to public security," other than for the particular criminal investigation or proceeding underlying the request. Germany sought this broadening of the strict MLAT use limitation article found in approximately half of our MLATs in order to reflect corresponding provisions of German privacy law which provide its law enforcement agencies additional flexibility to use information received from a foreign government. The United States anticipates that Article 15(3)

could be relied upon, for example, where information supplied by Germany about an individual who is the subject of a U.S. criminal prosecution also is relevant to a separate U.S. criminal investigation into threatened terrorist activity. This provision thus is helpful to the United States by creating a presumption that information received pursuant to an MLAT request can be used for prevention as well as prosecution purposes.

- (b) Similar language is included in Article 9(1)(b) of the 2003 Agreement on Mutual Legal Assistance between the United States and the European Union, and in the implementing mutual legal assistance instruments currently being completed with each EU member state. The U.S.-EU Agreement, together with all implementing instruments, will be submitted to the Senate in 2006 for its advice and consent to ratification. Once these agreements enter into force, this additional flexibility in using information supplied pursuant to an MLAT request will be available to the United States in its judicial assistance relationships across the EU. Whether such a provision will be included in future U.S. MLATs with non-European governments will depend in part upon whether they have adopted privacy laws of the type found in Europe.

Senator Lugar also asked whether the dual central authority system under the U.S.-Japan mutual legal assistance treaty would affect the ability of the United States to obtain assistance under the treaty.

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- (a) Japan has designated the Minister of Justice as the central authority for all requests made by the United States. In this regard, the Japan MLAT will work the same way as other U.S. MLATs. With respect to requests made by Japan, the Minister of Justice will serve as the central authority for requests submitted by Japanese public prosecutors or the judicial police, or if a request requires examination of a witness in a U.S. court. The National Public Safety Commission will serve as the central authority for requests submitted by the Japanese National Police or imperial guard officers. The two Japanese agencies will establish a mechanism to avoid unnecessary duplication and facilitate efficient provision of assistance. If neces-

sary, the U.S. Department of Justice may consult with the Japanese Ministry of Justice regarding the execution of any request, regardless of which agency initiated the request on the Japanese side.

(b) This arrangement is not expected to affect the ability of the United States to obtain assistance under the treaty, since the Minister of Justice will be the central authority for all requests made by the United States. Thus, whenever the United States requests assistance under the treaty, the Japan MLAT will work in the same way as other MLATs.

## **2. Secretary of State Decision to Extradite**

### **a. Mironescu v. Rice**

On October 3, 2005, the United States filed a brief in the District Court for the Middle District of North Carolina in support of a motion to dismiss a petition for writ of habeas corpus filed after a warrant was signed for the fugitive's surrender for extradition. *Mironescu v. Rice*, 1:05CV00683, M.D.N.C. (2005).

Excerpts below from the U.S. brief set forth the U.S. position that the petition for habeas corpus should be dismissed because under the Rule of Non-Inquiry, courts do not inquire into the conditions or treatment that a fugitive may face after extradition; instead, such issues are for the consideration of the Secretary of State when deciding whether extradition should be granted or denied. The brief also pointed out that the Convention Against Torture, the Foreign Affairs Reform and Restructuring Act, and the Administrative Procedure Act do not provide a basis for reviewing the Secretary's decision. Finally, the Secretary of State had neither physical nor legal custody of the petitioner, and therefore she could not be a proper respondent to a habeas petition. Although not excerpted here, the brief also refuted Mironescu's argument that he should be released because more than two months had passed since the court last acted on his prior petition for a writ of habeas corpus. The case was pending at the end of 2005.

The full text of the U.S. brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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## ARGUMENT

“[M]atters involving extradition have traditionally been entrusted to the broad discretion of the executive.” *See Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). This is especially important in the context of international extradition, which “necessarily implicate[s] the foreign policy interests of the United States.” *Id.*; *see Prushinowski v. Samples*, 734 F.2d 1016, 1019 n.2 (4th Cir. 1984) (“The State Department . . . not the courts, is the agency primarily charged with responsibility in the area . . .”). Thus, the courts adhere to a “Rule of Non-Inquiry” regarding any humanitarian arguments against extradition to a foreign country, holding that “it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.” *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005); accord *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999). As another district court in the Fourth Circuit has held, under “the well established rule of non-inquiry . . . [i]nquiry is prohibited into the conditions and treatment which a relator might face upon extradition.” *In re Extradition of Atuar*, 300 F. Supp. 2d 418, 432 (S.D. W. Va. 2003). Thus, “[h]umanitarian considerations are not within the province of the Court. Rather, they are for consideration of the Department of State.” *Id.* at 426 (citations omitted).

Under the Rule of Non-Inquiry, the courts also “refrain from investigating the fairness of a requesting nation’s justice system.” *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997). For example, courts are not to accept evidence regarding the requesting country’s “law enforcement procedures and its treatment of prisoners”; such evidence is irrelevant and improper on a habeas petition challenging extradition. *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the



manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds.

*Id.* (citation omitted).

The Rule of Non-Inquiry “is shaped by concerns about institutional competence and by notions of separation of powers,” *Kin-Hong*, 110 F.3d at 110: “Extradition is an executive, not a judicial, function. The power to extradite derives from the President’s power to conduct foreign affairs.” *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993). The courts also recognize that they are “ill-equipped . . . to make inquiries into and pronouncements about the workings of foreign countries’ justice systems.” *In re Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995). “It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.” *Kin-Hong*, 110 F.3d at 111.

The Department of State also has a greater range of choices than the courts in responding to an extradition request and in protecting the fugitive after extradition. *See Peroff*, 563 F.2d at 1102 (“The need for flexibility in the exercise of Executive discretion is heightened in international extradition proceedings . . .”). For example, with respect to torture claims like those raised here, the Department’s regulations provide:

Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

22 C.F.R. § 95.3(b). One kind of “condition” upon which the Department of State may surrender a fugitive is a demand that the requesting country provide assurances regarding the individual’s treatment. *See Jimenez v. United States District Court*, 84 S. Ct. 14, 19 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers). The Department of State, but not the courts, is in a position to know whether an extradition should be conditioned on

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the provision of any assurances by the requesting country, and to determine whether any such assurances are adhered to after extradition. As the First Circuit has noted:

The Secretary may also decline to surrender the relator on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations. Additionally, the Secretary may attach conditions to the surrender of the relator. The State Department alone, and not the judiciary, has the power to attach conditions to an order of extradition. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the relator.

*Kin-Hong*, 110 F.2d at 109-10 (citations omitted); see *United States v. Baez*, 349 F.3d 90, 92-93 (2d Cir. 2003) (referring to assurances provided by United States upon extradition of fugitive by another country). Thus, the courts recognize that “the executive branch’s ultimate decision on extradition may [properly] be based on a variety of grounds, ranging from individual circumstances, to foreign policy concerns, to political exigencies.” *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). *Contra* Petition at 21 (arguing that, in absence of further judicial review, extradition may be improperly influenced by “political, economic and foreign policy considerations”).

As described above, the federal judiciary has an important statutorily-defined role in the U.S. extradition process. Federal judges decide whether extradition requests meet the requirements of the applicable extradition treaties, and whether the requesting country’s evidence establishes probable cause to believe that the fugitive committed the crimes charged—a solidly traditional judicial function. If the extradition judge certifies extraditability, the fugitive can file a habeas petition to seek review of the judge’s determination on those issues.

Once the courts have determined extraditability, however, the process moves into foreign affairs, and authority over its pursuit shifts entirely to the Executive Branch. At that stage, the Secretary of State exercises her discretion to decide whether, and under what circumstances, a fugitive should be returned to the requesting country. The statutory commission of this decision to the Secretary’s discretion reflects a recognition of the fact that the decision necessarily

involves sensitive foreign relations considerations that are not amenable to review.

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I. Neither the Convention Against Torture Nor Section 2242 of the FARR Act Abrogates the Rule of Non-Inquiry

\* \* \* \*

A treaty is an agreement between or among two or more nations. “International treaties are not presumed to create rights that are privately enforceable.” *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). (fn. omitted) Only a treaty that is deemed “self-executing . . . become[s] effective as judicially enforceable law without the enactment of implementing legislation.” *In re Extradition of Atuar*, 300 F. Supp. 2d 418, 432 (S.D. W.Va. 2003). Moreover, “[c]ourts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.” *Goldstar (Panama) S.A.*, 967 F.2d at 968. The Senate’s resolution consenting to a treaty may provide explicitly that the treaty is not self-executing; in such cases, the courts uniformly give effect to such language. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2767 (2004). The effect of such a condition is that the treaty does “not itself create obligations enforceable in the federal courts.” *Id.* Several courts, including the Fourth Circuit, have squarely held that the Convention Against Torture is not self-executing. *See Malm v. INS*, 16 Fed. Appx. 197, No. 00-2371 (4th Cir. Aug. 10, 2001) . . . Moreover, no court, as far as the respondents are aware, has ever held to the contrary. In *Malm*, petitioner sought to avoid removal (deportation) for overstaying her visa.<sup>9</sup> . . . The court rejected petitioner’s contention that reliance on [governing regulations that imposed a time

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<sup>9</sup> Although the *Malm* decision’s holding regarding the non-self-executing nature of the Convention Against Torture applies here, there are critical distinctions between removal and extradition in other respects. Removal, in contrast to extradition, involves only one sovereign—the United States. *See McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986) (contrasting extradition and deportation), overruled in part on other grounds *Barapind v. Enomoto*, 400 F.3d 744, 751 n.7 (9th Cir. 2005). Unlike removal, extradition is initiated

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limit for filing a motion alleging that her removal would be contrary to the Convention against Torture] was improper in that the Convention Against Torture does not itself impose such procedural limitations. 16 Fed. Appx. at 200-02. In so holding, the court observed that the Convention is not self-executing:

[I]n passing a resolution of ratification, the United States Senate specifically stated that articles one through sixteen of [the Convention Against Torture] are not self-executing. 136 Cong. Rec. S17486, S17492 (Oct. 27, 1990). A treaty that is not self-executing is enforceable only to the extent that it is implemented by Congress.

*Id.* at 202. Therefore, the court held, assertions that removal should be withheld under the Convention are properly subject to the procedural requirements of the governing regulations. *Id.*

The petitioner here contends that the Senate's statement that the Convention Against Torture is not self-executing, in ratifying the Convention, meant only that "the treaty would not create a private cause of action," and that he "is not relying on the Convention as a basis for a cause of action." . . . But it is not only an independent cause of action that is unavailable. As the Fifth Circuit has noted, habeas relief is not available for an alleged violation of a treaty that is not self-executing. *See Wesson v. U.S. Penitentiary*, 305 F.3d 343, 348 (5th Cir. 2002). Similarly, in the Fourth Circuit's decision in *Malm*, cited above, the petitioner did not seek to bring a "cause of action" based on the Convention Against Torture, but to avoid removal on the basis that she would likely be subject to torture in her country of origin, just as the petitioner here seeks to avoid extradition on the same basis. 16 Fed. Appx. at 200, 201.

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by foreign states and is carried out pursuant to international agreements. It thus inherently concerns the reciprocal legal and political relationships of the United States with other countries, and the interpretation and application of treaty commitments with these countries—matters particularly within the expertise and constitutional authority of the Executive Branch. Whereas extradition matters are handled primarily by the Department of State, removal is governed by the Immigration and Nationality Act and regulations promulgated by the Immigration and Naturalization Service within the Department of Justice (now Immigration and Customs Enforcement within the Department of Homeland Security).

The court nevertheless held that the Convention was not enforceable for such a claim. *Id.* at 202. In summary, since the Convention Against Torture is not self-executing, petitioner may not challenge his extradition directly under the Convention.

Petitioner also contends that his extradition would violate section 2242 of the FARR Act, in which Congress implemented the Convention Against Torture. See Petition at 18. However, section 2242 itself, and the regulations promulgated thereunder, expressly preclude petitioner's reliance on this statute in this regard. Section 2242 provides:

Notwithstanding any other provision of law . . . no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention [Against Torture] or this section . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

Pub. L. 105-277, § 2242(d), 112 Stat. 2681, 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note). This statement clearly establishes that, by passing the Act, Congress did not intend to provide judicial review of extradition determinations by the Secretary of State. In any event, the FARR Act was passed long after the courts had fully developed the Rule of Non-Inquiry, and nothing in the Act suggests that Congress meant to override this well-accepted doctrine. *See, Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("Congress is presumed to enact legislation with knowledge of the law . . .").

The Department of State's regulations implementing section 2242 also reflect the lack of any right to judicial review. The regulations provide:

Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section

2242(d) of the [FARR Act], notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242 . . . except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

22 C.F.R. § 95.4. Especially in light of Congress's explicit delegation of authority to promulgate regulations to "implement" the Convention Against Torture, see Pub. L. 105-277, § 2242(b), 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231 note), these regulations deserve substantial deference as published agency interpretations of the Act. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

The Department of State's decision-making process in extradition cases, sensitive in even the ordinary case, raises even more sensitive issues when the fugitive makes claims under the Convention Against Torture. In assessing such claims, the Department may need to weigh conflicting evidence from various sources regarding the situation in the requesting country. It may need to decide whether to raise with foreign officials the often delicate question of possible mistreatment, and, if so, with which officials and in what format. The Department must then determine whether to seek assurances from the requesting country. Necessarily, it must also determine whether such assurances are likely to be reliable and credible. Those determinations can depend on a host of factors, ranging from an evaluation of the requesting country's government and its degree of control over the various actors within the foreign judicial system, to predictions about how the country's government is likely to act in practice, in light of its past assurances and behavior, to assessments as to whether confidential diplomacy or public pronouncements would best protect the interests of the fugitive. These determinations are all inherently discretionary, and intrinsically within the power of the Executive to engage in highly sensitive foreign relations. Neither the Convention nor its imple-

menting statute provide a basis for judicial review of the Secretary's extradition decision.

II. The Administrative Procedure Act Provides No Basis for Reviewing the Secretary's Extradition Decision

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[Among other things], the [Administrative Procedure Act ("APA")] also provides that judicial review is precluded where "statutes preclude judicial review," or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). . . . This exception to judicial review applies here because the extradition statute gives the Secretary non-reviewable discretion over the ultimate decision about extradition, see 18 U.S.C. §§ 3184, 3186, and because the courts' repeated application of the Rule of Non-Inquiry constitutes a "judicial history" of not reviewing such determinations. Moreover, as noted above, section 2242 of the FARR Act expressly provides that nothing in that statute shall be construed as reversing this history. See Pub. L. 105-277, § 2242(d), 112 Stat. At 2681-822.

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Also, in determining which categories of agency action are unreviewable under section 701(a)(2), the Supreme Court has considered whether the actions in question have, by tradition, been left to agency discretion. . . . [T]he Secretary's extradition decisions have traditionally been "committed to agency discretion," not only pursuant to the judicial Rule of Non-Inquiry, but also pursuant to statute. See 18 U.S.C. § 3186. . . .<sup>10</sup>

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<sup>10</sup> In seeking review of the Secretary's extradition decision under the APA, petitioner relies heavily on the decision of a Ninth Circuit panel in *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). Respondents submit that that decision's commentary regarding APA review is incorrect, for all of the reasons stated in the text herein. In any event, besides not being binding on this Court, the language on which petitioner relies in that decision was dicta, given that the habeas petition under review by the panel was dismissed because the Secretary had not yet made her extradition decision, just as Mr. Mironescu's first habeas petition was dismissed. As pointed out in the concur-



IV. Secretary Rice Should Be Dismissed as a Respondent, and the Case Caption Changed to Reflect Her Dismissal

. . . Generally, the only proper respondent on a habeas petition is the officer having immediate custody of the petitioner. The federal habeas statute provides that the proper respondent is “the person who has custody over [petitioner].” 28 U.S.C. § 2242; see id. § 2243 (“The writ, or order to show cause shall be directed to the person having custody of the person detained.”); see also *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 2717 (2004). . . .

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The respondents named here are the Sheriff of Forsyth County, North Carolina, who allegedly “control[s]” the detention facility where petitioner is located; the United States Marshal for the Middle District of North Carolina, who allegedly has “custody” of the petitioner and presumably took him into custody; and the United States Secretary of State, who has neither custody nor control of the petitioner. Under the rules described above, only the Sheriff or the United States Marshal can be an appropriate respondent in this matter. The Sheriff has immediate physical custody of the petitioner, and the Marshal may be said to be a proper respondent because petitioner is in federal custody. In no sense, however, can the Secretary of State be said to have “custody” of Mr. Mironescu.

Thus, the Secretary of State should be dismissed as a respondent. The caption of this matter should also be changed to reflect

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ring opinion by one member of the *Cornejo-Barreto* panel, and in a later decision by a different Ninth Circuit panel in relation to Cornejo-Barreto’s second habeas petition, the availability or unavailability of judicial review after a final extradition decision was not properly before the first panel. See *id.* at 1017 (Kozinski, C.J., concurring); *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1079 (9th Cir. 2004) (holding that prior panel’s “discussion is advisory and we are not bound by it”), vacated as moot *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (en banc); see also *Karsten v. Kaiser Found. Health Plan*, 36 F.3d 8, 11 (4th Cir. 1994) (noting that courts should refrain from “solving questions that do not actually require answering in order to resolve the matters before them”). The issue never reached the en banc Ninth Circuit in *Cornejo-Barreto*, because the case was dismissed as moot after the applicable statutory limitations period expired and the requesting country withdrew its extradition request. See 389 F.3d 1307.



her dismissal—even if the petition is dismissed on its merits—to avoid any inference, in future cases, that the Secretary is a proper respondent under such a petition. . . .

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**b. Hoxha v. Levi**

Similar issues were raised in an appeal to the U.S. Circuit Court of Appeals for the Third Circuit from a denial of habeas corpus relief in *Hoxha v. Levi*, 371 F. Supp. 2d 651 (E.D. Pa. 2005). In that case Hoxha appealed dismissal of his petition for habeas corpus from a finding of extraditability by a magistrate judge, arguing that (1) he should have been permitted to present evidence negating the showing of probable cause in the case; (2) the extradition treaty between the United States and Albania was no longer valid and (3) he faced a substantial threat of torture if the Secretary of State decided to extradite him to Albania.

In responding to these arguments, the United States brief, filed December 21, 2005, set forth its views that the denial of habeas relief was correct on all points. As to the first point, the U.S. brief explained that Hoxha did not dispute that “the information provided by Albanian authorities, if accepted at face value, presented probable cause of the accusation against him. Instead, Hoxha argued that the magistrate judge “should have permitted him to offer testimony by telephone from Albania from several witnesses, in order to negate the showing of probable cause.” As explained in the U.S. brief, however, “the extradition court is authorized to conduct only a ‘limited inquiry.’” In this case, “[t]he magistrate judge performed his role in determining (as is uncontested) that the Albanian government set forth a statement of probable cause; it would not be appropriate for him to weigh the credibility or impeachment of witnesses. . . .”

As to Hoxha’s second argument, the brief stated that “[t]he un rebutted evidence submitted to the court in this case likewise demonstrated the unambiguous and conclusive view of both nations that the treaty with Albania is in effect.” Fi-

nally, the brief addressed Hoxha's request for review of torture-related allegations. The full text of the brief, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

... There appear to be two elements to Hoxha's argument: (1) he contends that this Court should create a "humanitarian exception" to the extradition provisions in the applicable treaty with Albania, and should apply it in light of his torture threat allegation; and (2) he argues that his extradition is forbidden by Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 ("the FARR Act"), codified at 8 U.S.C. § 1231 note, implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention") (1465 U.N.T.S. 85 (1987); 1830 U.N.T.S. 320 (1994)). Hoxha claims that the FARR Act and the Torture Convention may be enforced through the Administrative Procedure Act ("the APA"), 5 U.S.C. § 704.

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A. The Decision About Whether to Extradite Hoxha in Light of his Humanitarian Exception Claims Rests Entirely with the Secretary of State.

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Once a fugitive has been found extraditable by the Judicial Branch, by statute responsibility transfers to the Secretary of State, and the decision whether the fugitive will actually be surrendered is committed to her discretion. See 18 U.S.C. § 3186 . . .

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In his habeas petition seeking review of the magistrate judge's determination of extraditability, Hoxha contended that he cannot be extradited because he faces, in the words of his appellate brief, "a substantial threat of torture" in Albania. . Hoxha asserts that, under such circumstances, his extradition should be barred by an implicit "humanitarian exception" to be read into the applicable extradition treaty with Albania. Additionally, Hoxha claims that his extradition is forbidden by Section 2242 of the FARR Act, implementing the Torture Convention.

In carrying out the responsibilities of the United States under the Torture Convention, Section 2242(a) of the FARR Act provides that it is “the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” In addition, Section 2242(b) directs “the heads of the appropriate agencies” to “prescribe regulations to implement the obligations of the United States under Article 3” of the Torture Convention. That article provides that no state party to the convention shall extradite a person to another nation “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” S. Treaty Doc. 100-20, at 20 (1988). This Court has explained that the central issue under Article 3 and the FARR Act is whether it is “more likely than not” that a person would be tortured. *Auguste v. Ridge*, 395 F.3d 123, 149 (3d Cir. 2005).

State Department regulations provide that “the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition.” 22 C.F.R. § 95.2(b). When allegations regarding torture have been made in extradition cases, “appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.” *Id.* at § 95.3(a). Thereafter, “[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.” *Id.* at § 95.3(b).

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In sum, before deciding whether or not to actually direct Hoxha’s surrender to Albania, the State Department must investigate and analyze a variety of facts and considerations, including humanitarian concerns, as well as the governing law in the FARR Act and State Department regulations, and possibly engage in sensitive diplomatic communications and actions regarding whether assurances should be sought. While a magistrate judge has certified to the Secretary that

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Hoxha is extraditable under 18 U.S.C. § 1384, the Secretary has to date made no decision regarding Hoxha's extradition.

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Despite the Rule of Non-Inquiry, Hoxha urges this Court to create a "humanitarian exception" to extradition as a matter of law when a fugitive asserts that he faces a substantial threat of torture in the receiving country. Br. 36, quoting *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9th Cir. 1997). The district court here correctly rejected this argument, holding that a decision concerning whether or not humanitarian concerns justify declining a particular extradition "is a matter clearly committed to the discretion of the Secretary of State. . . . It is within the sole discretion of the Secretary of State to refuse to extradite an individual on humanitarian grounds in light of the treatment and consequences that await that individual." *Id.* at 11-12.

The district court's conclusion was compelled by the precedent of this Court. In *Sidali*, 107 F.3d at 191 n.7, the Court noted that the petitioner there had urged the Court to uphold the grant of habeas relief against extradition on "humanitarian grounds unrelated to the finding of probable cause . . . ." The Court denied this contention: "[I]t is the function of the Secretary of State—not the courts—to determine whether extradition should be denied on humanitarian grounds." *Id.*

This Court's precedent is consistent with the law in other Circuits. . . .

The district court's final discussion on this point in the case at bar is therefore correct: "In sum, the separate branches of government each have clearly defined roles in the extradition process. It is the duty of the judicial branch to ensure that the individual sought is subject to extradition, while it is the duty of the executive branch, which possesses great power in the realm of foreign affairs, to ensure that extradition is not sought for political reasons and that no individual will be subject to torture if extradited." App. 12-13.

B. Hoxha's Claim that Habeas Relief Is Appropriate Here through a Cause of Action Under the Administrative Procedure Act to Review His Claim Under the FARR Act and the Torture Convention Is Incorrect.

Hoxha also contends . . . that this Court should direct the grant of his habeas petition under the Administrative Procedure Act because the Torture Convention and Section 2242 of the FARR Act prohibit his extradition in light of the alleged substantial threat of torture in Albania. This argument fails for the same reasons articulated by the district court in rejecting Hoxha's argument for a humanitarian exception to extradition: nothing in the FARR Act or the APA abrogates the Rule of Non-Inquiry (and the Torture Convention does not itself create judicially enforceable rights for individuals).

1. Hoxha's effort to present a cause of action under the APA should be denied at this time.

Hoxha cites the Ninth Circuit's decision in *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and argues that this Court may review his torture-based claims under the APA, 5 U.S.C. §§ 701-706. The issue of whether the APA affords a right of judicial review of an extradition surrender decision by the Secretary of State is in one sense premature, because the Secretary has not yet made a determination on whether to surrender Hoxha notwithstanding his assertion that he will be tortured in Albania. The APA provides for judicial review of "final agency action," 5 U.S.C. § 704, but there has been no such action by the Secretary at this stage. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all"). Indeed, in *Cornejo-Barreto*, upon which Hoxha relies, the Ninth Circuit panel actually held only that the FARR Act/Torture Convention claim was not ripe because the Secretary of State had not yet made a surrender decision. *See* 218 F.3d at 1016 (dismissing habeas petition as unripe in the absence of any "final agency action" by the Secretary).

Significantly, however, neither Hoxha's brief nor the *Cornejo-Barreto* decision addresses the question of whether dismissal on

lack of ripeness is appropriate at this point when dismissal of Hoxha's FARR Act/Torture Convention claim would also be required on non-justiciability grounds in light of the Rule of Non-Inquiry. Ripeness doctrine draws "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003), quoting *Reno v. Catholic Social Serv., Inc.*, 509 U.S. 43, 57 n.18 (1993). But the Supreme Court has held that, when faced with a threshold, categorical "rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry," a court may dismiss a cause of action based on that rule before addressing other, potentially dispositive jurisdictional limitations. *Tenet v. Doe*, 125 S. Ct. 1230, 1235 n.4 (2005) . . . . The Rule of Non-Inquiry, which serves to maintain a proper distribution of functions between the Judicial and Executive Branches and to preclude judicial review of matters confided wholly to the Secretary of State, represents such a categorical legal rule.

\* \* \* \*

### 3. Political Offense Exception in Extradition Treaty

On March 9, 2005, the Ninth Circuit Court of Appeals, sitting *en banc*, issued an opinion remanding a case for further proceedings on the applicability of the political offense exception under the Treaty for the Mutual Extradition of Criminals Between the United States of America and Great Britain, Dec. 22, 1931, 47 Stat. 2122, made applicable to India in 1942. *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005). The case arose out of the Government of India's request for the extradition of Kulbir Singh Barapind, who had been prominently affiliated with the Sikh separatist movement in the Punjab region in the mid-1980s and early 1990s, on criminal charges arising out of eleven separate incidents. In prior proceedings, the extradition court had denied certification of extraditability for the charges relating to eight out of eleven of the incidents (for failure to show probable cause or because of a finding that the offenses were covered by the Treaty's political offense exception) but had certified extraditability for murder and at-

tempted murder charges stemming from the three remaining incidents. The district court denied Barapind's petition for a writ of habeas corpus with respect to the finding of extraditability, *In re Extradition of Singh*, 170 F. Supp. 2d 982 (E.D. Cal, 2001), and a three-judge panel of the Ninth Circuit Court of Appeals affirmed. The Ninth Circuit opinion was subsequently vacated and en banc rehearing was granted. *Barapind v. Enomoto*, 381 F.3d 867 (9th Cir. 2004).

In its *en banc* decision, the Ninth Circuit affirmed the district court's denial of Barapind's habeas petition concerning two of the three incidents at issue, but with respect to the third incident, which concerned four murders that occurred during a shootout between Sikh insurgents and an Indian government officer, a former officer, and their bodyguard, it found that the court had improperly failed to apply the interpretation of the political offense exception to which it was bound under *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986). The court explained:

To determine whether the political offense doctrine bars extradition, we apply a two-prong "incidence test." For a crime to qualify as "one of a political character," Treaty art. 6, there must be: "(1) the occurrence of an uprising or other violent political disturbance at the time of the charged offense, and (2) a charged offense that is 'incidental to' 'in the course of,' or 'in furtherance of' the uprising," *Quinn*, 783 F.2d at 797 (footnotes and citations omitted).

As to the first prong, the court found that "[t]here is no real doubt that the crimes Barapind is accused of committing occurred during a time of violent political disturbance in India." As to the second prong, however, the court noted that "[t]he extradition court found that it was not bound by *Quinn's* discussion of the 'incidental to' prong . . . [which was] . . . a mistaken understanding of what constitutes circuit law."

The Ninth Circuit remanded the case to the district court for consideration of how the "incidental to" analysis from

*Quinn* would apply to the third remaining incident in Barapind's case, stating:

This is particularly important given that there is at least some evidence, including the affiliation of the victims with the Indian government and India's charging of TADA [Terrorist and Disruptive Activities Act] violations, that might suggest the crimes were political offenses.

On remand, the district court found that Barapind had failed to establish that the crimes at issue were political offenses. Under *Quinn*, the court explained, the murders

are incidental to the Sikh uprising if the crimes were "related to or connected with" the Sikh independent Khalistan movement. . . . The killings must bear some causal or ideological relationship to the uprising. . . . It is Petitioner who must produce evidence that shows some factual nexus between the murders and the Sikh independence movement. . . .

*Barapind v. Amador*, Memorandum Decision and Order on Remand from the Court of Appeals re: Extradition (E.D. Cal., Oct. 24, 2005) attached as Exhibit A to *In re Extradition of Singh*, 2005 U.S. Dist. LEXIS 42969 (E.D. Cal. 2005), certifying Barapind's extraditability to the Secretary of State.

The court examined Barapind's evidence that "there was an uprising; he was a revolutionary supporting the uprising; the attack [which was] on [a] gypsy vehicle was similar to other attacks by revolutionaries during the Sikh insurgency; two of the victims were armed constables, whose weapons were stolen after they were shot; and political (TADA) charges were brought in association with these crimes." The court found this showing insufficient to meet the factual nexus requirement under *Quinn* and certified Barapind to be extradited for the criminal charges related to the shootout, stating:

Petitioner has not provided evidence as to the reasons for the victims' vehicle's presence at the encounter site, nor that ambushes of gypsy vehicles in Jahander district [where the attack occurred] were presumptively political,



or that any victim was anti-Sikh or had any political identity or purpose related to the Sikh uprising. Nothing is known about the other three perpetrators. Petitioner's expert testified that the Punjab had a historically high crime rate and cultural history of non-political murder and revenge killings. There is no evidence as to what prompted Petitioner and the other assailants to open fire on the gypsy vehicle and to murder the four victims and take the weapons. That the attack took place during the uprising is not sufficient.

#### **4. Probable Cause Standard in Extradition Treaty**

A letter dated September 1, 2005, from Mary Ellen Warlow, Director of the Office of International Affairs, Criminal Division, U.S. Department of Justice, to Andrew Kristjanson, Senior Legal Officer of the Extradition Unit, International Crime Branch, Australia Attorney-General's Department, responded to an inquiry concerning what constitutes "reasonable grounds to believe" as contemplated by Article 11(3)(c) of the U.S.-Australia Extradition Treaty. Excerpts below provide the U.S. analysis that "the 'reasonable grounds' clause in the Treaty equates to the U.S. requirement for probable cause in criminal matters." The full text of the letter is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

##### **(1) Reasonable Grounds Equates to Probable Cause**

The standard of proof for an extradition request under the 1974 U.S.-Australia Extradition Treaty, as amended by the Protocol signed on September 4, 1990, can be found in Article 7 of the Protocol, (fn. omitted) which provides in pertinent part:

(3) A request for the extradition of a person who is sought for prosecution or who has been found guilty in his absence shall also be supported by:

...

(c) a description of the facts, by way of affidavit, statement, or declaration, setting forth reasonable grounds for believing that an offence has been committed and that the person sought committed it.

The United States interprets this standard—“reasonable grounds for believing that an offence has been committed”—as equivalent to “probable cause,” as that term is used and understood in the United States criminal justice system.

Confirmation of this interpretation can be found from three sources: the history of the U.S.-Australia extradition treaty itself; the language of other U.S. extradition treaties; and case law in the United States addressing extradition requests. This memorandum will briefly cover each source.

**(a) The U.S.-Australia Extradition Treaty**

The 1974 Extradition Treaty between the U.S. and Australia originally provided, in Article XI, that a request must be accompanied by “such evidence as, according to the laws of the requested State, would justify [the fugitive’s] trial or committal for trial if the offense had been committed there.” Although the United States was able to process incoming extradition requests from Australia under that treaty upon a showing of probable cause, under Australian law, this standard was interpreted as requiring that United States requests to Australia contain evidence establishing a *prima facie* case of guilt in order for extraditions to proceed.

The 1990 Protocol was intended to change that standard, and to establish a more reciprocal relationship under which extradition requests to both countries would be analyzed under similar burdens of proof. Specifically, the goal of Article 7 of the Protocol was to establish a “probable cause” type of standard in both countries, although Australian law does not use that terminology.

The analysis of the Protocol presented by the United States Executive Branch to the United States Senate during the ratification process for the Protocol confirms this interpretation. In the Senate Committee’s report on the Protocol, the Senate printed the “formal

executive branch representation” as to the meaning of the Protocol, as follows:

The protocol will also reduce the evidentiary burden the United States must meet when making requests under the 1974 treaty. Article [XI] of the 1974 treaty states that extradition shall be granted only if the evidence is sufficient to justify the fugitive’s committal for trial. . . . Article 7 of the protocol should free the United States from this much higher standard by creating a new and different rule. . . . The negotiators anticipate that courts in the United States will continue to review Australian extradition requests for probable cause, while Australian courts will adopt a new standard of review which is much closer to probable cause than to a *prima facie* case.

Exec. Rpt. 102-30, 102nd Cong., 2d. Sess. (1992), at 8.

\* \* \* \*

## (2) Probable Cause

The probable cause standard applicable in U.S. extradition proceedings is defined in accordance with federal law and has been described as “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.” *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir.1973). *See also Sidali v. INS*, 107 F.3d 191, 199 (3rd Cir. 1997) (“a reasonable belief that the defendant was guilty of the crime charged”); *Austin v. Healy*, 5 F.3d 598, 605 (2d Cir. 1993) (same). In other words, probable cause is defined as a reasonable basis to believe that the person whose extradition is requested committed the offenses for which extradition is sought.

This is consistent with longstanding U.S. law, under which the courts have made clear that an extradition hearing is not a criminal trial; its purpose is merely to decide “probable cause” not guilt or innocence. *See, e.g., Fernandez v. Phillips*, 268 U.S. 311, 312-14 (1925); *Glucksman v. Henckel*, 221 U.S. 508, 512 (1911); *Simmons v. Braun*, 627 F.2d 635 (2nd Cir. 1980); *Peroff v. Hylton*,

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542 F.2d 1247, 1249 (4th Cir. 1976). In *Benson v. McMahon*, 127 U.S. 457, 462-63 (1888), the U.S. Supreme Court explained:

the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him.

Thus, when reviewing foreign extradition requests, U.S. courts will review the request to see if it demonstrates that *reliable* evidence exists in the requesting state to prove that the fugitive committed each offense for which extradition is requested. This demonstration must include more than just a statement of the facts. The specific source of evidence for the facts must also be described or included so that the U.S. court can evaluate its reliability. But the evidence need not be of the same quality or quantity as would be required to support a conviction after trial.

\* \* \* \*

### 5. Renditions

On December 5, 2005, Secretary of State Condoleezza Rice addressed issues related to “inquiries from the European Union, the Council of Europe, and from several individual countries about media reports concerning U.S. conduct in the war on terror.” In her remarks, the Secretary discussed renditions and other law enforcement issues among other aspects of the fight against terrorism, as excerpted below. The full text of the Secretary’s remarks is available at [www.state.gov/secretary/rm/2005/57602.htm](http://www.state.gov/secretary/rm/2005/57602.htm).

... We have received inquiries from the European Union, the Council of Europe, and from several individual countries about media reports concerning U.S. conduct in the war on terror. I am going to respond now to those inquiries, as I depart today for Europe. And this will also essentially form the text of the letter that I will send to Secretary Straw, who wrote on behalf of the European Union as the European Union President.

The United States and many other countries are waging a war against terrorism. For our country this war often takes the form of conventional military operations in places like Afghanistan and Iraq. Sometimes this is a political struggle, a war of ideas. It is a struggle waged also by our law enforcement agencies. Often we engage the enemy through the cooperation of our intelligence services with their foreign counterparts.

We must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law. In such places terrorists have planned the killings of thousands of innocents—in New York City or Nairobi, in Bali or London, in Madrid or Beslan, in Casablanca or Istanbul. Just two weeks ago I also visited a hotel ballroom in Amman, viewing the silent, shattered aftermath of one of those attacks.

The United States, and those countries that share the commitment to defend their citizens, will use every lawful weapon to defeat these terrorists. Protecting citizens is the first and oldest duty of any government. Sometimes these efforts are misunderstood. I want to help all of you understand the hard choices involved, and some of the responsibilities that go with them.

One of the difficult issues in this new kind of conflict is what to do with captured individuals who we know or believe to be terrorists. The individuals come from many countries and are often captured far from their original homes. Among them are those who are effectively stateless, owing allegiance only to the extremist cause of transnational terrorism. Many are extremely dangerous. And some have information that may save lives, perhaps even thousands of lives.

The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were de-

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signed for different needs. We have to adapt. Other governments are now also facing this challenge.

We consider the captured members of al-Qaida and its affiliates to be unlawful combatants who may be held, in accordance with the law of war, to keep them from killing innocents. We must treat them in accordance with our laws, which reflect the values of the American people. We must question them to gather potentially significant, life-saving, intelligence. We must bring terrorists to justice wherever possible.

For decades, the United States and other countries have used “renditions” to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.

In some situations a terrorist suspect can be extradited according to traditional judicial procedures. But there have long been many other cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extradition is not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.

Rendition is a vital tool in combating transnational terrorism. Its use is not unique to the United States, or to the current administration. Last year, then Director of Central Intelligence George Tenet recalled that our earlier counterterrorism successes included “the rendition of many dozens of terrorists prior to September 11, 2001.”

- Ramzi Youssef masterminded the 1993 bombing of the World Trade Center and plotted to blow up airliners over the Pacific Ocean, killing a Japanese airline passenger in a test of one of his bombs. Once tracked down, a rendition brought him to the United States, where he now serves a life sentence.
- One of history’s most infamous terrorists, best known as “Carlos the Jackal,” had participated in murders in Europe and the Middle East. He was finally captured in Sudan in 1994. A rendition by the French government brought him to justice in France, where he is now imprisoned. Indeed, the European Commission of Human Rights rejected Carlos’ claim that his rendition from Sudan was unlawful.

Renditions take terrorists out of action, and save lives.

In conducting such renditions, it is the policy of the United States, and I presume of any other democracies who use this procedure, to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. Torture is a term that is defined by law. We rely on our law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances. Moreover, in accordance with the policy of this administration:

- The United States has respected—and will continue to respect—the sovereignty of other countries.
- The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture.
- The United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured.
- The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.

International law allows a state to detain enemy combatants for the duration of hostilities. Detainees may only be held for an extended period if the intelligence or other evidence against them has been carefully evaluated and supports a determination that detention is lawful. The U.S. does not seek to hold anyone for a period beyond what is necessary to evaluate the intelligence or other evidence against them, prevent further acts of terrorism, or hold them for legal proceedings.

With respect to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States Government does not authorize or condone torture of detainees. Torture, and conspiracy to commit torture, are crimes under U.S. law, wherever they may occur in the world.

Violations of these and other detention standards have been investigated and punished. There have been cases of unlawful treatment of detainees, such as the abuse of a detainee by an intelligence

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agency contractor in Afghanistan or the horrible mistreatment of some prisoners at Abu Ghraib that sickened us all and which arose under the different legal framework that applies to armed conflict in Iraq. In such cases the United States has vigorously investigated, and where appropriate, prosecuted and punished those responsible. Some individuals have already been sentenced to lengthy terms in prison; others have been demoted or reprimanded.

As CIA Director Goss recently stated, our intelligence agencies have handled the gathering of intelligence from a very small number of extremely dangerous detainees, including the individuals who planned the 9/11 attacks in the United States, the attack on the U.S.S. Cole, and many other murders and attempted murders. It is the policy of the United States that this questioning is to be conducted within U.S. law and treaty obligations, without using torture. It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibit cruel, inhuman, or degrading treatment. The intelligence so gathered has stopped terrorist attacks and saved innocent lives—in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that cooperate in these matters.

Because this war on terrorism challenges traditional norms and precedents of previous conflicts, our citizens have been discussing and debating the proper legal standards that should apply. President Bush is working with the U.S. Congress to come up with good solutions. I want to emphasize a few key points.

- The United States is a country of laws. My colleagues and I have sworn to support and defend the Constitution of the United States. We believe in the rule of law.
- The United States Government must protect its citizens. We and our friends around the world have the responsibility to work together in finding practical ways to defend ourselves against ruthless enemies. And these terrorists are some of the most ruthless enemies we face.
- We cannot discuss information that would compromise the success of intelligence, law enforcement, and military operations. We expect that other nations share this view.



Some governments choose to cooperate with the United States in intelligence, law enforcement, or military matters. That cooperation is a two-way street. We share intelligence that has helped protect European countries from attack, helping save European lives.

It is up to those governments and their citizens to decide if they wish to work with us to prevent terrorist attacks against their own country or other countries, and decide how much sensitive information they can make public. They have a sovereign right to make that choice.

Debate in and among democracies is natural and healthy. I hope that that debate also includes a healthy regard for the responsibilities of governments to protect their citizens.

Four years after September 11, most of our populations are asking us if we are doing all that we can to protect them. I know what it is like to face an inquiry into whether everything was done that could have been done. So now, before the next attack, we should all consider the hard choices that democratic governments must face. And we can all best meet this danger if we work together.

## **B. INTERNATIONAL CRIMES**

### **1. Terrorism**

#### ***a. Country Reports on Terrorism***

In April 2005 the Department of State released its annual report pursuant to 22 U.S.C. § 2656f, Country Reports on Terrorism 2004, available at [www.state.gov/s/ct/rls/c14813.htm](http://www.state.gov/s/ct/rls/c14813.htm). Section 2656f(d) defines certain of the relevant statutory terms as follows:

- (1) the term “international terrorism” means terrorism involving citizens or the territory of more than one country;
- (2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; and
- (3) the term “terrorist group” means any group practicing, or which has significant subgroups which practice, international terrorism.

As noted in the report:

... 22 USC 2656f(d) is one of many US statutes and international legal instruments that concern terrorism and acts of violence, many of which use definitions for terrorism and related terms that are different from those used in this report. The interpretation and application of defined and related terms concerning terrorism in this report is therefore specific to the statutory and other requirements of the report, and is not intended to express the views of the US Government on how these terms should be interpreted or applied for any other purpose.

Among other things, the report includes a table providing parties and signatories to the twelve international counter-terrorism conventions in force as of 1999. Report at 17-26.

**b. Nuclear terrorism**

*(1) International Convention for the Suppression of Nuclear Terrorism*

On April 13, 2005, the UN General Assembly adopted by consensus the International Convention for the Suppression of Nuclear Terrorism ("Nuclear Terrorism Convention"). U.N. Doc. A/RES/59/290 (2005). The text of the convention is included as an annex to the resolution and is also available at [http://untreaty.un.org/English/Terrorism/English\\_18\\_15.pdf](http://untreaty.un.org/English/Terrorism/English_18_15.pdf). The new convention provides for states parties to exercise criminal jurisdiction over certain acts committed by persons who possess or use radioactive material or a nuclear device, or who use or damage a nuclear facility in a manner that releases or risks the release of radioactive material.

Like other terrorist conventions, the new convention requires parties to criminalize under their domestic laws certain types of criminal offenses (Article 2 and 5) and to establish jurisdiction where the offense is committed in that party's territory, on its vessel or aircraft, or by one of its nationals (Article 9). Under that article a party may establish jurisdiction on additional grounds, including where its national

is a victim; where the offense is committed against its facilities abroad, including its embassies and other diplomatic or consular premises; or if the offense is committed in an attempt to compel that State to do or abstain from doing any act. Among other things, the convention also provides for mutual legal assistance (Article 10) and requires parties to extradite or submit for prosecution persons accused of committing, attempting to commit, or aiding in the commission of such offenses (Article 11). States must make efforts to prevent offenses through protecting radioactive material (Article 8) and provide for the safekeeping and return of radioactive material, devices, and nuclear facilities seized or otherwise taken control of following the commission of an offense created under the convention (Article 18).

With certain exceptions, the convention does not apply “where the offense is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis . . . to exercise jurisdiction.” Article 4 includes a military exclusion provision as found in the Terrorist Bombings Convention and other limitations on scope; *see* Chapter 18.A.2; *see also* 18.C.2.f. concerning nonproliferation issues.

The United States joined consensus in the General Assembly and signed the convention on September 14, 2005, when it was opened for signature. In welcoming the adoption of the convention in the General Assembly on April 13, Ambassador Stuart Holliday, Alternate U.S. Representative to the UN for Special Political Affairs, provided the views of the United States, as excerpted below and available at [www.un.int/usa/05\\_o68.htm](http://www.un.int/usa/05_o68.htm). *See also* press statement released by Richard Boucher, Department of State spokesman, on the same date, available at [www.state.gov/r/pa/prs/ps/2005/44603.htm](http://www.state.gov/r/pa/prs/ps/2005/44603.htm). The Bush-Putin joint statement referred to below is discussed in Chapter 18.C.1.d.(2).

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The United States welcomes the achievement of the General Assembly in concluding its work on the International Convention for the

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Suppression of Acts of Nuclear Terrorism and adopting it by consensus. By its action today, the General Assembly has shown that it can, when it has the political will, play an important role in the global fight against terrorism.

The Nuclear Terrorism Convention, when it enters into force, will strengthen the international legal framework to combat terrorism, along with the 12 existing international terrorism conventions and protocols. The Convention will provide a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit terrorist acts involving radioactive material or a nuclear device.

Seven years ago, the Russian Federation took the initiative to propose this important Convention, which addresses the particularly horrible consequences that acts of nuclear terrorism could entail. . . .

President Bush and Russian President Putin called for early adoption of this Convention in their February 24 joint statement in Bratislava on Nuclear Security Cooperation, as did the Secretary-General in his March 21st report entitled "In Larger Freedom." We are pleased that Member States demonstrated a seriousness of purpose and worked together in this multilateral setting to conclude the Convention and thereby send an undeniably clear signal that the international community will not tolerate those who threaten or commit terrorist acts involving radioactive material or nuclear devices.

\* \* \* \*

The Nuclear Terrorism Convention adopted today by consensus is the first counter-terrorism convention adopted by the General Assembly since the terrorist attacks of September 11, 2001. We call on Member States to build on the success of this effort and to work cooperatively to conclude the still outstanding Comprehensive Convention on International Terrorism.

Finally, with respect to the Nuclear Terrorism Convention, our work is not yet finished. If it is to have meaning, we need to bring the results of our work into force. We urge Member States to sign the convention when it is open for signature in September and to ratify it and implement it as soon as possible.

(2) *Amendment to the Convention on the Physical Protection of Nuclear Material*

On July 8, 2005, delegates from 88 countries, including the United States, and the European Atomic Energy Community ("EURATOM") meeting at the International Atomic Energy Agency ("IAEA") in Vienna, Austria, July 4-8, 2005, adopted by consensus an amendment to the Convention on the Physical Protection of Nuclear Material ("CPPNM"). The text of the amendment is reprinted in the report by the Director General containing the Final Act adopted July 8, 2005, GOV/INF/2005/10-GC(49)/INF/6, available at [www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf](http://www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf).

The agreement culminated efforts that began in 1998 as a U.S. initiative to strengthen the convention and the international regime for the physical protection of nuclear material and nuclear facilities used for peaceful purposes. Nonproliferation aspects of the treaty are discussed in Chapter 18.C.2.e.

Among other things, new paragraph 1 of Article 7 of the convention would establish new criminal offenses that must be made punishable by each State Party to the amended convention under its national law. The enumerated offenses include the international commission of

- (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment;
- (b) a theft or robbery of nuclear material;

\* \* \* \*

- (e) an act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or where he knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless the act is undertaken in conformity

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with the national law of the State Party in the territory of which the nuclear facility is situated;

(f) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

(g) a threat:

(i) to use nuclear material to cause death or serious injury to any person or substantial damage to property or to the environment or to commit the offence described in sub-paragraph (e), or

(ii) to commit an offence described in sub-paragraphs (b) and (e) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

Like the Nuclear Terrorism Convention discussed *supra*, the amendment to the CPPNM includes a military exclusion as new article 4(b). See discussion in Chapter 18.A.2.

### c. 2005 World Summit

As discussed in Chapter 7.A.1.d., one of the issues addressed in the 2005 World Summit Outcome Document was terrorism. In a fact sheet released October 7, 2005, the Department of State stated as follows on the terrorism section of the final document:

**Anti-Terrorism:** The Summit Declaration contains a strong condemnation of all forms of terrorism. The United States was able to prevent the inclusion of language that would have condoned terrorist acts by national liberation movements. In addition, the Declaration stresses the need to conclude a Comprehensive Convention against International Terrorism.

The full text of the fact sheet is available at [www.state.gov/p/io/fs/57527.htm](http://www.state.gov/p/io/fs/57527.htm). See also U.S. statements on terrorism issues in UN reform in Chapter 7.A.1.b. and c.

**d. OAS terrorism convention**

On December 15, 2005, the Inter-American Convention Against Terrorism entered into force for the United States. A press release issued on November 15, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/56929.htm](http://www.state.gov/r/pa/prs/ps/2005/56929.htm). For the text of the convention, see [www.oas.org/juridico/english/treaties/a-66.htm](http://www.oas.org/juridico/english/treaties/a-66.htm); see also *Digest 2004* at 96-97; *Digest 2002* at 112-17 (S. Treaty Doc. No. 107-18 (2002)).

On October 7, 2005, the U.S. Senate gave its advice and consent to the President's ratification of the Inter-American Convention against Terrorism. On November 2, 2005, President Bush signed the instrument of ratification for the Inter-American Convention Against Terrorism.

The United States deposited the instrument of ratification at the Organization of American States headquarters in Washington, D.C. on November 15, 2005, and will become party to the Convention 30 days thereafter in accordance with the Convention's terms.

The Convention entered into force internationally on July 10, 2003, after six countries became party. As of November 15, 2005, there are 34 Signatories and 13 Parties to the Convention (Antigua and Barbuda, Brazil, Canada, Chile, Dominica, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela).

The Convention, passed by the Organization of American States (OAS) in the immediate aftermath of the tragic events of September 11, 2001, commits state parties to endeavor to become party to ten international conventions and protocols relating to terrorism (listed in the Convention), consistent with U.N. Security Council Resolution 1373. The Convention also commits state parties to take certain measures to prevent, combat, and eradicate the financing of terrorism and to deny safe haven to suspected terrorists. The Treaty further requires that the terrorist acts covered under the specified international conventions and protocols be criminalized as predicate crimes to money laundering. The Convention provides for enhanced cooperation in a number of areas, including exchanges of information, border control measures, and law enforcement actions.

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***e. 2005 protocols to the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to its Protocol on Fixed Platforms***

On October 14, 2005, an International Maritime Organization (“IMO”) diplomatic conference adopted two protocols: to the UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) and to the related Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (“Fixed Platforms Protocol”). As explained in a fact sheet released by the Department of State on October 21, 2005, “[t]he SUA and the Fixed Platforms Protocol—originally adopted in response to the 1985 hijacking of the Italian-flag cruise ship Achille Lauro and the murder of an American passenger—are two of the 12 UN counterterrorism conventions. The new Protocols, when they enter into force, will add to this list and will fill important gaps in the worldwide fight against terrorism.” The fact sheet summarized the new counterterrorism offenses as criminalizing

the use of a ship or a fixed platform to intimidate a population or compel a Government or international organization, including when: (1) explosive, radioactive material or a biological, chemical or nuclear weapon is used against, on or discharged from a ship or fixed platform; (2) certain hazardous or noxious substances are discharged from a ship or fixed platform; or (3) any other use is made of a ship in a manner that may lead to or causes death, serious injury or damage. The SUA Protocol also criminalizes transport of fugitives who have committed an offense under the 12 UN terrorism conventions and protocols.

The full text of the fact sheet is available at [www.state.gov/t/isn/rls/fs/58322.htm](http://www.state.gov/t/isn/rls/fs/58322.htm). The protocols will also update SUA and the Fixed Platforms Protocol consistent with the most recent UN terrorism conventions in areas including extradition and



mutual legal assistance. For further discussion of the protocols, *see* Chapter 18.C.2.d.

On September 22, 2005, the United States submitted comments providing the views of the United States on certain areas of interest. IMO Docs LEG/CONF.15/14 and LEG/CONF.15/15 (both dated September 20, 2005), available at [www.state.gov/t/isn/trty/58320.htm](http://www.state.gov/t/isn/trty/58320.htm) and [www.state.gov/t/isn/trty/58319.htm](http://www.state.gov/t/isn/trty/58319.htm) respectively. *See also* [www.imo.org/Conventions/mainframe.asp?topic\\_id=259&doc\\_id=686#review](http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686#review).

***f. U.S. actions against terrorist financing***

***(1) Designation of foreign terrorist organizations***

On October 11, 2005, the Office of Counterterrorism, U.S. Department of State, issued an updated fact sheet regarding designation of entities as foreign terrorist organizations under § 219 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1189. Excerpts below provide the applicable legal criteria and process as well as the ramifications of such designations (footnotes omitted). The full text of the fact sheet, which also includes a current list of the 42 designated organizations, is available at [www.state.gov/s/ct/rls/fs/37191.htm](http://www.state.gov/s/ct/rls/fs/37191.htm). *See also* press statement announcing designation of additional foreign terrorist organization, October 11, 2005, available at [www.state.gov/r/pa/prs/ps/2005/54677.htm](http://www.state.gov/r/pa/prs/ps/2005/54677.htm).

Foreign Terrorist Organizations (FTOs) are foreign organizations that are designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended. FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business.

**Identification**

The Office of the Coordinator for Counterterrorism in the State Department (S/CT) continually monitors the activities of ter-

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rorist groups active around the world to identify potential targets for designation. When reviewing potential targets, S/CT looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts.

### Designation

Once a target is identified, S/CT prepares a detailed “administrative record,” which is a compilation of information, typically including both classified and open sources information, demonstrating that the statutory criteria for designation have been satisfied. If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary’s intent to designate the organization and given seven days to review the designation, as the INA requires. Upon the expiration of the seven-day waiting period and in the absence of Congressional action to block the designation, notice of the designation is published in the Federal Register, at which point the designation takes effect. By law an organization designated as an FTO may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit not later than 30 days after the designation is published in the Federal Register.

Until recently the INA provided that FTOs must be redesignated every two years or the designation would lapse. Under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), however, the redesignation requirement was replaced by certain review and revocation procedures. IRTPA provides that an FTO may file a petition for revocation 2 years after its designation date (or in the case of redesignated FTOs, its most recent redesignation date) or 2 years after the determination date on its most recent petition for revocation. In order to provide a basis for revocation, the petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different as to warrant revocation. If no such review has been conducted during a five year period with respect to a designation, then the Secretary of State is required to review the desig-

nation to determine whether revocation would be appropriate. In addition, the Secretary of State may at any time revoke a designation upon a finding that the circumstances forming the basis for the designation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation. The same procedural requirements apply to revocations made by the Secretary of State as apply to designations. A designation may be revoked by an Act of Congress, or set aside by a Court order.

**Legal Criteria for Designation under Section 219 of the INA as amended**

1. It must be a foreign organization.
2. The organization must engage in terrorist activity, as defined in section 212 (a)(3)(B) of the INA (8 U.S.C. § 1182(a)(3)(B)), or terrorism, as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. § 2656f(d)(2)), or retain the capability and intent to engage in terrorist activity or terrorism.
3. The organization's terrorist activity or terrorism must threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.

**Legal Ramifications of Designation**

1. It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO. [18 U.S.C. § 2339B(a)(1)](The term "material support or resources" is defined in 18 U.S.C. § 2339A(b)(1) as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." 18 U.S.C. § 2339A(b)(2) provides that for these purposes "the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general

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knowledge.” 18 U.S.C. § 2339A(b)(3) further provides that for these purposes “the term ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge.”

2. Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances, removable from the United States (see 8 U.S.C. §§ 1182 (a)(3)(B)(i)(IV)-(V), 1227 (a)(1)(A)).
3. Any U.S. financial institution that becomes aware that it has possession of or control over funds in which a designated FTO or its agent has an interest must retain possession of or control over the funds and report the funds to the Office of Foreign Assets Control of the U.S. Department of the Treasury.

### Other Effects of Designation

1. Supports our efforts to curb terrorism financing and to encourage other nations to do the same.
2. Stigmatizes and isolates designated terrorist organizations internationally.
3. Deters donations or contributions to and economic transactions with named organizations.
4. Heightens public awareness and knowledge of terrorist organizations.
5. Signals to other governments our concern about named organizations.

\* \* \* \*

### (2) *Litigation*

#### (i) *United States v. Afshari*

On October 20, 2005, the U.S. Court of Appeals for the Ninth Circuit reversed a district court decision dismissing an indictment under § 2339B(a)(1) on the ground that the terrorist designation statute, 8 U.S.C. § 1189, was uncon-

stitutional. *United States v. Afshari*, 426 F.3d 1150 (9th Cir. 2005).<sup>\*</sup> The lower court opinion, *United States v. Rahmani*, is discussed in Digest 2002 at 93. As explained by the Ninth Circuit (footnotes omitted):

[Section 2339B] assigns criminal penalties to one who “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so.” The statutory phrase “terrorist organization” is a term of art, defined by Congress as “an organization designated as a terrorist organization” under 8 U.S.C. § 1189(a)(1). The defendants’ central argument is that § 2339B denies them their constitutional rights because it prohibits them from collaterally attacking the designation of a foreign terrorist organization. This contention was recently rejected by the Fourth Circuit en banc.<sup>\*\*</sup> We, too, reject it.

The court reviewed the “convoluted litigation history” concerning the designation of the Mujahedin-e Khalq (“MEK”) because it was “important to the outcome of the case”:

The MEK was first designated a terrorist organization in 1997. The D.C. Circuit upheld this designation because the MEK was a “foreign entity without . . . presence in this country” and thus “had no constitutional rights under the due process clause.” Therefore, the MEK was not entitled to notice and a hearing. It also found the administrative record sufficient to establish that the MEK “engages in terrorist activity.” In the process of designating MEK a terrorist organization in 1999, the State Department determined that another organization, the National Council of Resistance of Iran, was an “alias” of the MEK. When reviewing the 1999 designation, the D.C. Circuit held that the second organization had a presence in the United

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<sup>\*</sup> By order of the same date, the Ninth Circuit withdrew its prior decision in the case dated June 17, 2005, 412 F.3d 1071, which had withdrawn a decision of December 20, 2004, 392 F.3d 1031. 427 F.3d 646 (9th Cir. 2005). Both of the earlier opinions had also reversed the district court decision.

<sup>\*\*</sup> Editor’s note: See *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004)(en banc), discussed in *Digest 2004* at 126-28.

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States and, based on that presence, that both organizations were entitled to “the opportunity to be heard at a meaningful time and in a meaningful manner.”

The D.C. Circuit remanded the 1999 designation to the State Department with the instructions that both organizations be given an opportunity “to file evidence in support of their allegations that they are not terrorist organizations.” Instead, the MEK submitted evidence showing that it was responsible for numerous assassinations of Iranian officials and mortar attacks on Iranian government installations. Upon reviewing this redesignation, the D.C. Circuit noted that any procedural due process error that might have existed was harmless because the MEK had “effectively admitted” that it was a terrorist organization.

*See also Digest 2003 at 176-77 and Digest 2002 at 91-92.* On August 24, 2005, the United States filed an Opposition to Rehearing and Rehearing En Banc in the Ninth Circuit, available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Further excerpts setting forth the court’s analysis of the legal issues follow (footnotes omitted).

\* \* \* \*

8 U.S.C. § 1189(a)(1) sets out a carefully articulated scheme for designating foreign terrorist organizations. To make the designation, the Secretary has to make specific findings that “the organization is a foreign organization”; that “the organization engages in terrorist activity (as defined in 8 U.S.C. § 1182(a)(3)(B))”; and that “the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.”

The Secretary of State’s designation is only the beginning. The Secretary also must furnish the congressional leadership advance notification of the designation and the factual basis for it, which Congress can reject. The designation is published in the Federal Register. The designated organization is entitled to judicial review of the Secretary’s action in the United States Court of Appeals for the District of Columbia. That court is directed to set aside the designation for the ordinary administrative law reasons, such as that

the designation is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” That court must also set aside a designation for several other reasons, including that the designation is “contrary to constitutional right, power, privilege, or immunity.” Congress or the Secretary can revoke a designation. Among the concrete incentives that a designated organization has to contest the designation is that the Secretary of the Treasury may require American financial institutions to block all financial transactions involving its assets.

\* \* \* \*

. . . [A] holding that a restriction of judicial review of the Secretary of State’s designation of a terrorist organization to the Court of Appeals for the D.C. Circuit is not facially unconstitutional does not settle the question whether a defendant may be criminally prosecuted for donating to a designated organization. A defendant prosecuted in district court for donating to such an organization may bring a due process challenge to his or her prosecution in the district court. The district court properly ruled that it had jurisdiction to review this challenge. But its conclusion that § 1189 is facially unconstitutional, because judicial review of the terrorist designation was assigned exclusively to the D.C. Circuit, was in error.

\* \* \* \*

The specific section that is at issue here is 8 U.S.C. § 1189(a)(8), which states in relevant part:

If a designation . . . has become effective . . . a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing.

The defendants are right that § 1189(a)(8) prevents them from contending, in defense of the charges against them under 18 U.S.C. § 2339B, that the designated terrorist organization is not really terrorist at all. . . . Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policy-

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making authority out of the hands of United States Attorneys and juries. Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.

The question then is whether due process prohibits a prosecution under § 2339B when the court vested with the power to review and set aside the predicate designation determines that the designation was obtained in an unconstitutional or otherwise erroneous manner, but nevertheless declines to set it aside. In reviewing MEK's 1999 designation, the D.C. Circuit found that "the designation does violate the due process rights of the petitioners under the Fifth Amendment" because the designation process did not afford MEK notice or an opportunity to be heard. The D.C. Circuit did not vacate the designation, citing foreign policy and national security concerns as well as the fact that the designation would be expiring shortly. Instead it left the designation in place and remanded to the Secretary of State with instructions that MEK be afforded due process rights.

\* \* \* \*

Defendants further claim that the Due Process Clause prevents a designation found to be unconstitutional from serving as a predicate for the charge of providing material support to a designated terrorist organization, even if the designation has never been set aside. There are several reasons why this argument lacks force.

First, the Supreme Court in *Lewis v. United States* [445 U.S. 55 (1980)] held that a prior conviction could properly be used as a predicate for a subsequent conviction for a felon in possession of a firearm, even though it had been obtained in violation of the Sixth Amendment right to counsel. . . .

. . . [A] criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as a sufficient opportunity for judicial review of the predicate exists. Here there was such an opportunity, which the MEK took advantage of each time it was designated a foreign terrorist organization.

Second, the D.C. Circuit declined to set aside the 1999 designation. It remanded the determination but carefully explained that it



did not vacate the designation. After the remand, the D.C. Circuit upheld the redesignation; therefore, at all relevant times, the “foreign terrorist organization” designation had been in full force. This court and the D.C. Circuit are co-equal courts. We cannot reverse its decision. Additionally, the statute expressly provides that only the D.C. Circuit may review these designations, so it would be contrary to the statutory scheme for us to hold that the designation was invalid. We have already determined that any constitutional challenge against 8 U.S.C. § 1189 “must be raised in an appeal from a decision to designate a particular organization” and must be heard in the D.C. Circuit [*Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000)].

Third, 18 U.S.C. § 2339B only requires that Rahmani, et al., had knowledge of the MEK’s designation as a foreign terrorist organization. The Fourth Circuit, sitting en banc, held that a criminal defendant charged under this statute cannot bring a challenge to the validity of a designation of an organization as “terrorist.” In a case where there was no indication that the designation was invalid (other than the defendant’s would-be challenge), the Fourth Circuit wrote, “The *fact* of an organization’s designation as an [terrorist organization] is an element of § 2339B, but the *validity* of the designation is not.” Here, the MEK has been designated a terrorist organization throughout the relevant period, and that designation has never been set aside. According to the indictment, defendants had knowledge of this designation, they were told during a telephone conference call with an MEK leader in October 1997 that the MEK had been designated a foreign terrorist organization by the State Department.

Fourth, as discussed earlier, the D.C. Circuit ultimately held that the procedural due process violation it identified was harmless. When challenging the 1999 designation, the MEK admitted to numerous terrorist acts making an argument that amounted to a claim that the enemy of our enemy is our friend, a decision that is committed to the Executive Branch, not the courts. Due to this “admission,” the D.C. Circuit held that, even if there were a due process violation, the MEK was not harmed by it.

Thus, defendants’ new due process argument attacks a designation that withstood judicial review, that we have no authority to re-

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view, that defendants knew was in place throughout the period of the indictment, and that is supported by the MEK's own submission. Defendants suffered no deprivation of due process, and even if they had, it was harmless.

\* \* \* \*

### III. First Amendment claim.

The defendants argue that the MEK is not a terrorist organization, and that they have a right under the First Amendment to contribute money to it. The argument is: (1) they have a First Amendment right to contribute to organizations that are not terrorist; (2) the statutory scheme denies them the opportunity to challenge the "foreign terrorist organization" designation; so therefore (3) it deprives them of their First Amendment right to make contributions to non-terrorist organizations.

This argument is mistaken because what the defendants propose to do is not to engage in speech, but rather to provide material assistance. The statute says "knowingly provides material support or resources to a foreign terrorist organization." The indictment charges them with sending money to the MEK.

\* \* \* \*

What is at issue here is not anything close to pure speech. It is, rather, material support to foreign organizations that the United States has deemed, through a process defined by federal statute and including judicial review by the D.C. Circuit, a threat to our national security. The fact that the support takes the form of money does not make the support the equivalent of speech. In this context, the donation of money could properly be viewed by the government as more like the donation of bombs and ammunition than speech. The "foreign terrorist organization" designation means that the Executive Branch has determined—and the D.C. Circuit, in choosing not to set aside the designation, has concluded that the determination was properly made—that materially supporting the organization is materially supporting actual violence.

\* \* \* \*

We have already held that the strict scrutiny standard applicable to speech regulations does not apply to a prohibition against sending money to foreign terrorist organizations. [*Humanitarian Law Project*, 205 F. 3d 1130, 1135] That a group engages in politics and has political goals does not imply that all support for it is speech, or that it promotes its political goals by means of speech. . . . The government “may certainly regulate contributions to organizations performing unlawful or harmful activities, even though such contributions may also express the donor’s feelings about the recipient.” There is no First Amendment right “to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions.”

\* \* \* \*

. . . The interest in protecting our country from foreign terrorist organizations is a fortiori “a sufficiently important interest” [to justify certain limits]. “The federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities.” “We must allow the political branches wide latitude in selecting the means to bring about the desired goal” of “preventing the United States from being used as a base for terrorist fundraising.”

. . . The sometimes subtle analysis of a foreign organization’s political program to determine whether it is indeed a terrorist threat to the United States is particularly within the expertise of the State Department and the Executive Branch. Juries could not make reliable determinations without extensive foreign policy education and the disclosure of classified materials. . . . Leaving the determination of whether a group is a “foreign terrorist organization” to the Executive Branch, coupled with the procedural protections and judicial review afforded by the statute, is both a reasonable and a constitutional way to make such determinations. The Constitution does not forbid Congress from requiring individuals, whether they agree with the Executive Branch determination or not, to refrain from furnishing material assistance to designated terrorist organizations during the period of designation.

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### (ii) Humanitarian Law Project v. Gonzales

On July 26, 2005, the U.S. District Court for the Central District of California, Western Division, denied the federal government's motion to dismiss and ruled on cross-motions for summary judgment in *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D.Cal. 2005). The case had been remanded by the Ninth Circuit sitting en banc for further action by the district court in light of the amendments to §§ 2339A and 2339B discussed above. *Humanitarian Law Project v. Ashcroft*, 393 F.3d 902 (9th Cir. 2004).<sup>\*</sup> See *Digest 2004* at 125-26.

In its 2005 decision, the district court stated:

After considering the arguments, the Court finds that the parties' cross-motions for summary judgment must be GRANTED IN PART and DENIED IN PART as follows: (1) the prohibition on providing material support to foreign terrorist organizations without requiring a showing of specific intent to further the organization's unlawful terrorist activities does not violate due process under the Fifth Amendment; (2) the terms "training," "expert advice or assistance," and "service" are impermissibly vague; (3) the term "personnel" is not impermissibly vague; (4) the prohibitions on providing "training," "expert advice or assistance," "personnel," and "service" are not overbroad; and (5) the exemption from prosecution for providing material support that has been approved by the Secretary of State is not an unconstitutional licensing scheme under the First Amendment.

Excerpts below from the court's opinion set forth its analysis of due process and vagueness claims.

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<sup>\*</sup> The district court opinion states erroneously that "the Ninth Circuit affirmed this Court's October 2, 2001 order holding the terms 'training' and 'personnel' impermissibly vague." In fact, the Ninth Circuit stated: "In light of Congress's recent amendment to the challenged statute . . . , we . . . vacate the judgment and injunction regarding the terms 'personnel' and 'training' and remand to the district court for further proceedings, if any, as appropriate."

\* \* \* \*

1. The Prohibition on Providing Material Support or Resources  
Does Not Violate the Fifth Amendment.

\* \* \* \*

... [T]he Court finds that the AEDPA does not violate due process under the Fifth Amendment and, therefore, declines to read a specific intent requirement into the statute. First, *Scales [v. United States]*, 367 U.S. 203 (1961), concerned with “criminalizing associational membership in violation of the First Amendment” is inapposite, as the holding there turned on specific facts not present here. Second, the clear and unambiguous Congressional intent to exclude a specific intent requirement precludes a judicial interpretation of a specific intent element. Finally, the statute’s current requirement that a donor know that the recipient of material support is a foreign terrorist organization eliminates any Fifth Amendment due process concerns.

\* \* \* \*

... The AEDPA, as amended by the IRTPA, . . . prohibits the provision of material support to a recipient that the donor knows is a foreign terrorist organization. Accordingly, congress’s clarification of the *mens rea* requirement satisfies the notion of personal guilt under the Due Process Clause because an offender must know that he or she was materially supporting a foreign terrorist organization.

\* \* \* \*

2. The Prohibitions on “Training,” “Expert Advice or Assistance,”  
and “Service” Are Impermissibly Vague, but “Personnel” is  
Permissible.

\* \* \* \*

A challenge to a statute based on vagueness grounds requires the court to consider whether the statute is “sufficiently clear so as not to cause persons of common intelligence . . . necessarily [to] guess at its meaning and [to] differ as to its application.” *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting

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*Connally v. General Constr. Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926)). Vague statutes are void for three reasons: “(1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms.” *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)).

“[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. . . . Thus, under the Due Process Clause, a criminal statute is void for vagueness if it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v. Harriss*, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954). A criminal statute must therefore “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . .” *United States v. Kolender*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

After considering the arguments, the Court finds that the terms “training,” “expert advice or assistance,” and “service” are impermissibly vague under the Fifth Amendment. With respect to the term “personnel,” the Court finds that the IRTPA amendment to “personnel” sufficiently cures the previous vagueness concerns. The Court addresses each of these terms separately below.

\* \* \* \*

The Court agrees with Plaintiffs that the IRTPA amendment to “training” (distinguishing between “specific skill” and “general knowledge”) fails to cure the vagueness concerns that the Court previously identified. Even as amended, the term “training” is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits. Moreover, the IRTPA amendment leaves the term “training” impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolu-

tions or how to petition the United Nations to seek redress for human rights violations.

\* \* \* \*

The Court agrees with Plaintiffs that the IRTPA amendment to “expert advice or assistance” (adding “specialized knowledge”) does not cure the vagueness issues. Even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand. Similar to the Court’s discussion of “training” above, “expert advice or assistance” remains impermissibly vague because “specialized knowledge” includes the same protected activities that “training” covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations. Moreover, the Federal Rules of Evidence’s inclusion of the phrase “scientific, technical, or other specialized knowledge” does not clarify the term “expert advice or assistance” for the average person with no background in law. Accordingly, the Court finds that the [term] “expert advice or assistance” fails to provide fair notice of the prohibited conduct and is impermissibly vague.

\* \* \* \*

The Court finds that the undefined term “service” in the IRTPA is impermissibly vague, as the statute defines “service” to include “training” or “expert advice or assistance,” terms the Court has already ruled are vague. Like “training” and “expert advice or assistance,” “it is easy to imagine protected expression that falls within the bounds of” the term “service.” *Humanitarian Law Project*, 205 F. 3d at 1137. Moreover, there is no readily apparent distinction between taking action “on behalf of another” and “for the benefit of another.” Defendants’ contradictory arguments on the scope of the prohibition only underscore the vagueness. As with “training” and “expert advice or assistance,” the term “service” fails to meet the enhanced requirement of clarity for statutes affecting protected expressive activities and imposing criminal sanctions.

\* \* \* \*

The IRTPA amendment now limits prosecution for providing “personnel” to the provision of “one or more individuals” to a for-

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eign terrorist organization “to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.” 18 U.S.C. § 2339B(h). Further, the statute states that “[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.” *Id.* . . .

The Court finds that the IRTPA amendment sufficiently narrows the term “personnel” to provide fair notice of the prohibited conduct. Limiting the provision of personnel to those working under the “direction or control” of a foreign terrorist organization or actually managing or supervising a foreign terrorist organization operation sufficiently identifies the prohibited conduct such that persons of ordinary intelligence can reasonably understand and avoid such conduct.

\* \* \* \*

### (iii) Islamic American Relief Agency v. Unidentified FBI Agents

On September 15, 2005, the U.S. District Court for the District of Columbia granted defendants’ motion for summary judgment in an action claiming violations of the First, Fourth, and Fifth Amendments of the U.S. Constitution, the International Emergency Economic Powers Act (“IEEPA”), and the Administrative Procedure Act (“APA”) in the blocking of plaintiff IARA-USA’s\* assets. *Islamic American Relief Agency*

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\* The opinion explains the relevant entities as follows: “The Islamic African Relief Agency, now the Islamic American Relief Agency (“IARA-USA”), based in Columbia, Missouri, was established in 1985 as a nonprofit humanitarian relief organization . . . At the time the IARA-USA was incorporated in the United States, an organization based in Sudan also existed under the name Islamic African Relief Agency (“IARA”). . . . In 2000, the IARA-USA began expanding and providing humanitarian relief to other countries outside of the African continent. . . . Thus, to reflect its broader mission, the plaintiff changed its name to the Islamic American Relief Agency (“IARA-USA”).



*v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005).  
As explained in the decision,

On October 13, 2004, pursuant to Global Terrorism Executive Order No. 13,224, and the IEEPA, the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC") designated the IARA, including the IARA-USA, as a Specially Designated Global Terrorist ("SDGT") and blocked the assets of the IARA, along with the assets of five its senior officials. . . . The designation was based on evidence, both classified and unclassified, that purportedly demonstrated that the IARA 'assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism . . . ' . . . Based upon the blocking notice against the IARA, the property of the IARA-USA was also blocked and its bank accounts frozen. . . .

IARA-USA challenged OFAC's decision to block its assets in an action brought against the Secretary of the Treasury and the Attorney General in their official capacities and various unidentified FBI agents, a named Special Agent with the IRS, and other unidentified Department of the Treasury employees both in their individual and official capacities.

In granting defendants' motion for summary judgment, the court examined and dismissed each of IARA-USA's alleged constitutional rights violations. Among other things, the court held that it lacked jurisdiction over certain claims under the Fourth Amendment and Fifth Amendment Takings Clause. To the extent that plaintiff was alleging that the blocking of its assets violated the Fourth Amendment, however, the court found that "case law is clear that a blocking of this nature does not constitute a seizure." Similarly, the court stated that "to the extent that the plaintiff seeks to challenge the blocking of assets pursuant to the Executive Order, such an order is not, as a matter of law, a taking within the meaning of the Fifth Amendment."

Excerpts below provide the court's analysis in rejecting IARA-USA's claim that its Fifth Amendment due process

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rights were violated because it was not afforded notice and a hearing before its assets were blocked.

\* \* \* \*

The Fifth Amendment provides that no person may “be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend V. “The fundamental requirement of [procedural] due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471 at 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). In resolving claims of procedural due process violations, three factors are considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335. Moreover, in applying this test, the Court is mindful that there are circumstances that “present[] an ‘extraordinary’ situation in which postponement of notice and hearing until after seizure does not deny due process.” *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974). As the Court noted in *Calero-Toledo*, even immediate seizure of a property interest is appropriate if (1) “the seizure has been directly necessary to secure an important governmental or general public interest;” (2) “there has been a spe-

cial need for very prompt action;” and (3) “the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.” *Id.* at 679 (citation omitted).

Here, the plaintiff claims its due process rights were violated because it was not afforded notice and a hearing before its assets were blocked. . . . In support of this argument, the plaintiff relies heavily on *Nat’l Council of Resistance of Iran (NCRI) v. Dep’t of State*, 346 U.S. App. D.C. 131, 251 F.3d 192, 205 (D.C. Cir. 2001). However, *NCRI* is inapposite. In *NCRI*, the District of Columbia Circuit held that notice and an opportunity to be heard must be afforded prior to designating an entity as a “foreign terrorist organization” under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). *NCRI*, 251 F.3d at 205-208. However, as another member of this Court has found, *NCRI* does not control in cases where action was taken pursuant to the IEEPA, as actions under the IEEPA “flow[] from a Presidentially declared national emergency.” *Holy Land Found.*, 219 F. Supp. 2d at 76. Moreover, the Circuit Court in *NCRI* did “not foreclose the possibility that the [government], in an appropriate case, [could] demonstrate the necessity of withholding all notice and all opportunity to present evidence until the designation [was] already made.” *NCRI*, 251 F.3d at 208. This is just such a case. Thus, this Court agrees with its colleague in *Holy Land Found.*, that the applicable test was enunciated in *Calero-Toledo*.

It cannot be reasonably argued that protecting the public from terrorist attacks is not an important governmental and public interest. Moreover, here,

prompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order. Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the IEEPA sanctions program virtually meaningless.

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*Holy Land Found.*, 219 F. Supp. 2d at 77. Finally, there is no dispute that the government, not private parties, initiated the blocking at issue here. Based on these circumstances, the Court agrees with the defendants' position that the plaintiffs were not entitled to pre-deprivation notice and a hearing. Accordingly, the plaintiff's due process challenge must be dismissed, as it fails to state a claim as a matter of law.

\* \* \* \*

### (3) *Sanctions*

#### (i) *Executive Order 13372*

On February 16, 2005, President George W. Bush issued Executive Order 13372, "Clarification of Certain Executive Orders Blocking Property and Prohibiting Certain Transactions." 70 Fed. Reg. 8499 (Feb. 18, 2005). Section 1 of the order amended section 4 of Executive Order 13224 to clarify that IEEPA's humanitarian aid exception does not authorize entities blocked pursuant to Executive Order 13324 to donate humanitarian aid articles to anyone, even unblocked persons, without prior authorization from OFAC. The amended section reads:

I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)), by, to, or for the benefit of, any persons determined to be subject to this order would seriously impair my ability to deal with the national emergency declared in this order, and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances, and I hereby prohibit such donations as provided by section 1 of this order. Furthermore, I hereby determine that the Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX, Public Law 106-387) shall not affect the imposition or the continuation of the imposition of any unilateral agricultural sanction or unilateral medical sanction on any person de-

terminated to be subject to this order because imminent involvement of the Armed Forces of the United States in hostilities is clearly indicated by the circumstances.

The executive order made a similar clarification to Executive Order 12947.

*(ii) Imposition of sanctions on Syrian individuals*

On June 30, 2005, the Department of the Treasury imposed sanctions on two Syrian individuals pursuant to Executive Order 13338. As described in a press statement of the same date, E.O. 13338 was signed on May 11, 2004, "in response to the Syrian government's continued support of international terrorism, sustained occupation of Lebanon, pursuit of weapons of mass destruction and missile programs and undermining of U.S. and international efforts in Iraq." The Order declared a national emergency with respect to Syria, authorized the blocking of property of certain persons, and directed a ban on exports to Syria. *See also Digest 2004 at 900-03.*

The press release, which provides further information concerning the activities of the two named individuals, is excerpted below and available at [www.treas.gov/press/releases/js2617.htm](http://www.treas.gov/press/releases/js2617.htm).

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The U.S. Department of the Treasury today named Ghazi Kanaan and Rustum Ghazali Specially Designated Nationals (SDNs) of Syria pursuant to Executive Order 13338, which is aimed at financially isolating individuals and entities contributing to the Government of Syria's problematic behavior.

"Actions like today's are intended to financially isolate bad actors supporting Syria's efforts to destabilize its neighbors," said Treasury Secretary John W. Snow.

"We are seeing democracy take hold in Lebanon and other places in the Middle East, yet Syria continues to support violent groups and political strife. Syria needs to join its neighbors in embracing the progress towards liberty," Snow continued.

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Information available to the U.S. Government indicates that Kanaan and Ghazali have directed the Syrian Arab Republic Government's (SARG) military and security presence in Lebanon and/or contributed to the SARG's support for terrorism. Both Ghazali and Kanaan allegedly engaged in a variety of corrupt activities and were reportedly the beneficiaries of corrupt business deals during their respective tenures in Lebanon.

Today's designation freezes any assets the designees may have located in the United States, and prohibits U.S. persons from engaging in transactions with these individuals.

\* \* \* \*

### ***g. Rewards for apprehension of terrorists***

On July 20, 2005, a press release from the Department of State announced a new advertising campaign in Afghanistan "to increase awareness of financial rewards being offered for information leading to the apprehension of wanted terrorists" pursuant to 22 U.S.C. § 2708.

\* \* \* \*

The television and radio spots announce rewards for Mullah Omar, Ayman Al Zawahiri and Usama Bin Laden. They remind the Afghans that these men are not only enemies of Afghanistan, but also of the world, and that in recent years, terrorists have been responsible for the murders of large numbers of their citizens. . . .

In addition to the radio and television ads, matchbooks and posters advertising the Rewards for Justice Program are being distributed nationwide. The matchbooks feature photos of Usama Bin Laden, Saif al-Adel, and Ayman Al-Zawahiri and text in Pashto and Dari. The posters show photos of the Rewards for Justice Program's 17 most wanted terrorists and contact information for U.S. Embassy Kabul, the Rewards for Justice website, and the local Provincial Reconstruction Team.

Since its inception in 1984, the Rewards for Justice Program has paid more than \$57 million to 43 persons who have provided

credible information that has resulted in the capture or death of terrorists or prevented acts of international terrorism.

\* \* \* \*

## **2. Genocide, War Crimes, and Crimes Against Humanity**

*See C. below and Chapter 6.F.*

## **3. Narcotrafficking**

### ***a. U.S. narcotics certification***

On September 15, 2005, President Bush issued Presidential Determination No. 2005-36, identifying Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela as major drug transit and major illicit drug producing countries, pursuant to § 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 ("FRAA"), Pub. L. No. 107-228, 116 Stat. 1350. 70 Fed. Reg 56,807 (Sept. 28, 2005). The determination, excerpted below, also identified concerns related to Afghanistan, Canada, Haiti, the Netherlands, Nigeria, and the Democratic People's Republic of Korea.

Statements of justification providing the basis for designation of Burma and Venezuela as countries that have failed demonstrably to take required measures were released September 15, and are available at [www.state.gov/p/inl/rls/other/53640.htm](http://www.state.gov/p/inl/rls/other/53640.htm) (Burma) and [www.state.gov/p/inl/rls/other/53641.htm](http://www.state.gov/p/inl/rls/other/53641.htm) (Venezuela).

\* \* \* \*

A country's presence on the Majors List is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. Consistent with the statutory definition of a major drug transit or drug-producing country set forth in section 481(e)(2) and (5) of the Foreign Assistance Act

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of 1961, as amended (FAA), one of the reasons that major drug transit or illicit drug producing countries are placed on the list is the combination of geographical, commercial, and economic factors that allow drugs to transit or be produced despite the concerned government's most assiduous enforcement measures.

Pursuant to section 706(2)(A) of the FRAA, I hereby designate Burma and Venezuela as countries that have failed demonstrably during the previous 12 months to adhere to their obligations under international counternarcotics agreements and take the measures set forth in section 489(a)(1) of the FAA. Attached to this report (Tab A) are justifications for the determinations on Burma and Venezuela, as required by section 706(2)(B).

I have also determined, in accordance with provisions of section 706(3)(A) of the FRAA, that support for programs to aid Venezuela's democratic institutions, establish selected community development projects, and strengthen Venezuela's political party system is vital to the national interests of the United States.

I have removed China and Vietnam from the list of major drug transit or major illicit drug producing countries because there is insufficient evidence to suggest that China is a major source zone or transit country for illicit narcotics that significantly affect the United States. There is insufficient evidence to refute claims by the Government of Vietnam that they have virtually eliminated opium poppy production. Additionally, although cooperation with United States law enforcement is limited, there are no indications of a significant Vietnam based drug threat to the United States.

On March 4, 2005, the U.S. Department of State issued the 2005 International Narcotics Control Strategy Report ("INCSR") pursuant to § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291. As explained in the introduction, the INCSR "provides the factual basis for the designations" made by the President, *supra*. The report, in two volumes covering calendar year 2004, is available at [www.state.gov/p/inl/rls/nrcrpt/2005/](http://www.state.gov/p/inl/rls/nrcrpt/2005/). Money laundering, covered in Volume II, is discussed in B.7. below.



**b. Litigation related to 1971 UN Convention on Psychotropic Substances**

On April 18, 2005, the U.S. Supreme Court granted a petition for certiorari to the U.S. Court of Appeals for the Tenth Circuit, *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), on the following question:

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse and is unsafe for use even under medical supervision, and where its importation and distribution would violate an international treaty.\*

In this case the Tenth Circuit had affirmed a district court decision preliminarily enjoining the federal government from prohibiting or penalizing the importation and sacramental use of hoasca, a hallucinogenic tea, in the United States by O Centro Espirita Beneficiente Uniao do Vegetal (“UDV”), a religious organization based in Brazil. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), *aff’d on rehearing en banc*, 389 F.3d 973 (10th Cir. 2004). The U.S. brief seeking rehearing en banc and reversal of the panel opinion is excerpted in *Digest 2003* at 184-86.

In its briefs on the merits filed with the Supreme Court in July and October 2005, the United States argued that UDV had failed to prove entitlement to the preliminary injunction, in light of applicable constraints under the federal Controlled Substances Act (“CSA”), 21 U.S.C. §§ 801-904, and U.S. obligations under the 1971 United Nations Convention on Psychotropic Substances (“Convention”), opened for signature Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. *See* Brief for the Peti-

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\* On February 21, 2006, the Supreme Court affirmed the Tenth Circuit opinion upholding the preliminary injunction against the federal government and and remanded for further proceedings. 126 S. Ct. 1211 (2006). Relevant issues will be discussed in *Digest 2006*.

tioners, filed July 2005, available at [www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1084.mer.aa.html](http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1084.mer.aa.html) and Reply Brief for Petitioners, filed October 2005, available at [www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1084.mer.rep.html](http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1084.mer.rep.html). The two-volume Joint Appendix is available at [www.usdoj.gov/osg/briefs/2005/3mer/2mer/toc3index.html](http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/toc3index.html).

Excerpts below from the July U.S. brief provide the statutory and treaty framework and the U.S. analysis of the applicable treaty obligations (footnotes and citations to other filings in the case omitted).

\* \* \* \*

1. a. The Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., makes it unlawful to possess or to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” any controlled substance, except as authorized by the Act itself. 21 U.S.C. 841(a)(1), 844(a). . . .

The CSA classifies controlled substances into five separate schedules based on their safety, the extent to which they have an accepted medical use, and the potential for abuse. 21 U.S.C. 812(b). A drug qualifies for listing on Schedule I if it “has a high potential for abuse,” “has no currently accepted medical use in treatment in the United States,” and has “a lack of accepted safety for use \* \* \* under medical supervision.” 21 U.S.C. 812(b)(1). The CSA comprehensively prohibits the importation, manufacture, distribution, possession, and use of Schedule I substances, except as part of strictly regulated research projects. 21 U.S.C. 823 (2000 & Supp. II 2002), 841(a), 844(a), 960(a)(1). Congress placed dimethyltryptamine (DMT), as well as “any material, compound, mixture, or preparation, which contains any quantity of [DMT],” in Schedule I. 21 U.S.C. 812(c), schedule I(c).

b. The 1971 United Nations Convention on Psychotropic Substances represents an international effort involving 176 Nations “to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise.” United Nations Convention on Psychotropic Substances (Convention), opened for signature Feb. 21, 1971, 32 U.S.T. 543, 545, 1019 U.N.T.S. 175, Preamble. The

Convention is a cornerstone of the international effort to combat drug abuse and transnational drug trafficking, reflecting the Parties' judgment that "rigorous measures are necessary to restrict the use of [psychotropic] substances to legitimate purposes," and that "effective measures against abuse of such substances require [international] co-ordination and universal action." Convention, Preamble.

Like the CSA, the Convention divides covered substances into schedules, and it lists DMT as a Schedule I substance subject to the most rigorous controls. See Convention, Appended List of Substances in the Schedules. . . .

The Convention permits Nations, at the time they join the Convention but not thereafter, to make "reservations" for substances derived from native-grown plants that are "traditionally used by certain small, clearly determined groups in magical or religious rites." Convention, Art. 32, para. 4. The United States took a reservation for peyote use by Indian Tribes. Such reservations apply only to domestic use of the drug and not to the Convention's international trade provisions. *Ibid.*

c. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., provides that the federal government "shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). RFRA applies to "all Federal law" and the implementation of that law. 42 U.S.C. 2000bb-3(a).

2. O Centro Espirita Beneficiente Uniao Do Vegetal (UDV) is a religious organization that was founded in Brazil in 1961 and opened its first branch in the United States in 1993. At least 34 times a year, . . . UDV's members engage in religious ceremonies involving the ingestion of a DMT-based tea referred to by adherents as "hoasca," . . . . The tea is made by brewing together two indigenous Brazilian plants: *psychotria viridis*, which contains DMT, and *banisteriopsis caapi*, which contains certain harmala alkaloids that catalyze DMT's hallucinogenic effects. Ingestion of the chemicals distilled by the brewing process "allows DMT to reach the brain in levels sufficient to significantly alter consciousness." *Ibid.* Because

those plants do not grow in the United States, hoasca must be prepared overseas and imported in liquid form. *Ibid.*

\* \* \* \*

## ARGUMENT

\* \* \* \*

### C. The United States Has A Compelling Interest In Complying With Its Treaty Obligations

“It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64 \* \* \* (1804), that ‘an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.’” *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). While RFRA plainly applies to “Federal law,” 42 U.S.C. 2000bb-3(a), the statute at no point “clear[ly] evidence[s]” “an intention to abrogate or modify[] treaty” obligations, *United States v. Dion*, 476 U.S. 734, 739, 740 (1986). Because “treaty rights [and obligations] are too fundamental to be easily cast aside,” *id.* at 739, courts “should be most cautious before interpreting” RFRA “in such manner as to violate international agreements.” *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

#### 1. The Convention Bans Hoasca

The district court paid no heed to the United States’ interest in complying with the Convention because it held that the Convention does not apply to hoasca. The Convention’s plain language says otherwise. It expressly lists DMT as a Schedule I substance, *see* Convention, Appended List of Substances in the Schedules, and provides that “a preparation is subject to the same measures of control as the psychotropic substance which it contains,” *id.* Art. 3, para. 1. A “preparation” is defined as “any solution or mixture, in whatever physical state, containing one or more psychotropic substances.” *Id.* Art. 1(f)(i) (emphasis added). The text could not be clearer. Indeed, it parallels the definition in the CSA that the district court unhesitatingly read to “clearly cover[] hoasca.” . . .

\* \* \* \*

. . . [T]he head of the Brazilian law enforcement agency charged with enforcing Brazil's controlled substance laws has advised the State Department that:

Any and all substance, liquid or solid, examined the by [sic] Brazilian authorities which contains in its composition the substance DMT, is considered illegal and constitutes crime, being prohibited its \* \* \* trade, exportation, importation. \* \* \* If the product seized in the United States contains, in its composition, the substance DMT, that product was prohibited from being exported from Brazilian territory, because it was an illicit drug. . . .

Letter from Ronaldo Urbano, General Coordinator, Drug Enforcement and Prevention Police, Brazil, to Mark Hoffman, United States Embassy, Brazil (July 8, 2005). . . .

2. Compliance with the Convention is a Compelling Interest that Cannot Be Advanced by any Less Restrictive Means

"Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). Here, the Senate, by its advice and consent, and the President, by his ratification, have exercised the treaty power, and the full Congress has concluded that faithful compliance with the Convention is "essential," 21 U.S.C. 801a(1), to the United States foreign policy interests and its protection of domestic public health and safety. Thus, the United States has a vital interest in abiding by this international obligation and in "gain[ing] the benefits of international accords and hav[ing] a role as a trusted partner in multilateral endeavors" designed to combat international drug trafficking. *Vimar Seguros*, 515 U.S. at 539. Moreover, that combined judgment pertains to the admission at the United States' borders of a dangerous foreign substance, a matter over which the Political Branches have long exercised plenary control.

In addition, preserving the government's ability to work cooperatively with other Nations in tackling problems as complex and

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vital to public health and safety as transnational trafficking in controlled substances is an interest of the highest order. The abuse of psychotropic substances is “not confined to national borders,” 21 U.S.C. 801a(1). Because closely complying with strict international controls on psychotropic substances is critical to the success of domestic efforts to combat drug abuse, Congress amended the CSA in 1978 to bring domestic law into compliance with the Convention. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, § 101, 92 Stat. 3768; 21 U.S.C. 801a(2). Congress determined that complying with the Convention’s terms—which necessarily included its carefully delimited exception for indigenous cultural and religious uses—was critical not just to “reducing the diversion of psychotropic substances,” but also to “the prevention of illicit trafficking in other countries” and promoting the United States’ “credibility” and “strengthen[ing] our leadership in international drug abuse control.” S. Rep. No. 959, 95th Cong., 2d Sess. 16 (1978).

Three judges below concluded that compliance with the Convention was not a compelling interest because the Convention permits reservations for substances derived from native-grown plants that are “traditionally used by certain small, clearly determined groups in magical or religious rites.” Convention, Art. 32, para. 4. Putting aside that hoasca has not been “traditionally used” in the United States and that UDV itself did not exist until 1961, by the terms of the Convention any reservation by the United States could only have been taken at the time the United States ratified the Convention in 1980, Convention, Art. 32. Moreover, by the terms of the Convention, any reservation could have been made only for the purely domestic use of native-grown plants, and would not excuse compliance with the Convention’s “provisions relating to international trade.” *Ibid.*\*

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\* Editor’s note: In its October 2005 Reply Brief, the United States addressed the unique nature of the peyote exemption as follows:

. . . It was only after rigorous study and review that Congress concluded that a narrow exception for the traditional use of a native-grown substance--the ceremonial usage of which pre-dates the founding of this Country--could be implemented without unraveling the CSA’s closed system of drug distribution. Even then, Congress

Indeed, far from helping respondents, the existence of that limited reservation provision proves that, in negotiating the Convention, the interests of religious claimants were given the type of careful, balanced consideration that RFRA requires—consideration carried forward domestically in Congress’s amendment of the CSA to conform to the Convention. The reservation provision’s strict limitations embody a broad international consensus that international trafficking in drugs raises distinct problems from the accommodation of domestic uses by indigenous groups, and that any further retraction in the Convention’s prohibitions would undercut efforts to combat international trafficking in psychotropic substances. Judge McConnell [in a separate opinion in the en banc decision] reasoned that RFRA obligates the United States to seek an “acceptable accommodation” under the Convention, even though the only avenue for “accommodation” at this juncture would be an amendment. But RFRA is a balance, not a trump card, and it certainly is not a license for judicial oversight of international treaty negotiations. Directing the Executive Branch to unravel a 176-party treaty that has never been amended in its 34-year history and

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carefully demarcated the bounds of the exception, confining it to federally recognized Indian Tribes, which have a unique sovereign status. *See* 42 U.S.C. 1996a(b)(1), (c)(1) and (2).

The peyote exception thus is more accurately described, not as a religious accommodation as such, but as a political accommodation for federally recognized Tribes. It is based on the unique cultural needs of another sovereign authority—one with its own distinct constitutional status, U.S. Const. Art. I, § 8, Cl. 3, law enforcement authority, *e.g.*, *United States v. Lara*, 541 U.S. 193 (2004), and governmental structure with which the federal government can reliably coordinate drug control matters without raising Establishment Clause concerns, *see* H.R. Rep. No. 675, 103d Cong., 2d Sess. 8-9 (1994). Indeed, Congress specifically found that the use of peyote “has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and culture,” 42 U.S.C. 1996a(a)(1). Congress’s careful creation of that distinct legislative scheme does not suggest that the CSA can safely be opened to a series of judicially crafted religious exceptions. Indeed, the rarity of the peyote exemption, its *sui generis* design arising out of the United States’ historic trust responsibilities and premised on a coordinated inter-sovereign relationship, and the lengthy legislative process that led to its enactment prove the opposite.



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that serves as a centerpiece of international efforts to address one of the most pressing and intractable law enforcement problems of the time would jettison rather than “sensibl[y] balance[,]” 42 U.S.C. 2000bb(a)(5), the government’s equally compelling interests in public health, safety, effective transnational cooperation in combating illicit drug trafficking, and abiding by international treaty obligations. The “always \* \* \* delicate” balancing of interests required by the Free Exercise Clause precedent on which RFRA is modeled, *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944), did not require Congress to amend the Social Security Act to accommodate Amish farmers in [*United States v. Lee*, 455 U.S. 252 (1982)], nor did it require Congress to amend the tax code to accommodate religious adherents in [*Hernandez v. Commissioner*, 490 U.S. 680 (1989)]. Even less so should RFRA’s statutory standard be construed as transferring to the judiciary responsibility for gauging the portentous diplomatic costs and foreign policy interests implicated by opening treaties to renegotiation by 176 Parties and eroding the comprehensiveness of a longstanding ban on transnational trafficking in dangerous psychotropic substances. “The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

Judge McConnell’s proposal [that the United States could seek an accommodation for hoasca] is as unworkable as it is wrong. In light of the Convention’s specific and deliberate limitation of reservations to the domestic use of native-grown plants, there is little reason to believe that a different balance would be struck at this point. In fact, the international trend is to the contrary, with the export ban in Brazil, ayahuasca abuse on the rise in Europe, and arrests for ayahuasca in Italy, Australia, Germany, and the Netherlands. In addition, the French government recently amended its law to make clear that its DMT prohibition extends to hoasca. France, Ministry for Solidarities, Health and the Family, Order of April 20, 2005, J.O., May 3, 2005, at 7636, Text 18.

\* \* \* \*



**c. *Certification of aerial counter-narcotics efforts involving use of lethal force***

On August 17, 2005, President Bush issued Presidential Determination No. 2005-32, certifying as follows with respect to Colombia:

Pursuant to the authority vested in me by section 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended (22 U.S.C. 2291-4), I hereby certify, with respect to Colombia, that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

70 Fed. Reg. 50,949 (Aug. 29, 2005). Under the statute, the President's certification is a prerequisite for providing U.S. assistance to certain aerial narcotics interdiction programs in which a foreign government may use lethal force against civil aircraft. *See Cumulative Digest 1991-1999* at 538-47.

On October 16, 2005, President Bush certified the same factors with respect to Brazil, thus renewing for another twelve months the basis for provision of U.S. assistance to the government of Brazil's aerial interdiction program. 70 Fed. Reg. 62,227 (Oct. 28, 2005).

**d. *Assistance for non-lethal aerial counter-narcotics efforts***

The United States provides several Latin American and Caribbean countries radar data on aircraft flying through those countries' airspace via the Cooperating Nation Information Exchange System ("CNIES"). In 2004 and 2005, the United States negotiated and concluded with several CNIES partner nations bilateral agreements that govern the permissible use

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and sharing of CNIES data as well as other U.S. government support for non-lethal aerial counter-narcotics efforts. Agreements “[t]o ensure that such data and other interception-related assistance is employed consistent with relevant U.S. criminal law,” executed as an exchange of diplomatic notes, were concluded with countries including Belize, El Salvador, Honduras, Guatemala, Jamaica, Panama, and Peru. Each agreement was based on a model U.S. diplomatic note, available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Excerpts from the model note set forth below provide for the prohibition on the use of force against civil aircraft and establish obligations related to the sharing of U.S. Government information with third parties.

\* \* \* \*

### III. Non-Use of Weapons Against Civil Aircraft

If U.S. Government assistance is used in any way to locate, identify, track, or intercept a civil aircraft, (host government) shall:

- (a) not damage, destroy, or disable any civil aircraft in service, and
- (b) not threaten to damage, destroy, or disable any civil aircraft in service.
  - (i) This does not preclude the firing of warning shots as a signaling measure, using ammunition containing tracer rounds, in order to be sure that the pilot is aware that he or she has been intercepted.
  - (ii) Warning shots may be fired only from a position slightly ahead of abeam and parallel to the course of the intercepted aircraft to ensure that the intercepted aircraft is not in the line of fire. The aircraft firing the warning shots shall take all reasonable cautionary measures to avoid shooting the intercepted aircraft, any other aircraft in the vicinity, or persons or property on the ground.

None of the commitments undertaken by (host government) in agreeing to these conditions are intended to preclude or limit (host

government's) ability to use weapons in the context of an act of self-defense.

#### IV. Sharing of Information

(Host government) shall not permit third parties access, without the specific written consent of the Embassy of the United States of America, to any information, data, or analysis that could be used for aerial interceptions that has been developed using U.S. Government assistance.

\* \* \* \*

#### *e. Caribbean regional maritime counter-drug agreement*

On July 15, 2005, the United Kingdom signed the Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area on behalf of itself and its Caribbean Overseas Territories (Anguilla, British Virgin Islands, Cayman Islands, Monserrat, and Turks and Caicos Islands). Although this brings the number of countries that have signed to twelve, only three countries, including the United States, have "expressed their consent to be bound" as set forth in Article 36.1. As provided in Article 36.2, the agreement will enter into force when five states have expressed their consent to be bound. In signing the agreement on April 10, 2003, the United States stated that it "sign[ed] the Agreement without reservation as to ratification, acceptance or approval." The text of the agreement and the U.S. declaration upon signing are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

Excerpts below from the agreement provide a statement of objectives and certain provisions as to which the United States included declarations in its signing statement. A list of maritime counter-narcotics law enforcement agreements signed by the United States as of August 2005 is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

## ARTICLE 2—OBJECTIVES

The Parties shall co-operate to the fullest extent possible in combating illicit maritime and air traffic in and over the waters of the Caribbean area, consistent with available law enforcement resources of the Parties and related priorities, in conformity with the international law of the sea and applicable agreements, with a view to ensuring that suspect vessels and suspect aircraft are detected, identified, continuously monitored, and where evidence of involvement in illicit traffic is found, suspect vessels are detained for appropriate law enforcement action by the responsible law enforcement authorities.

\* \* \* \*

## ARTICLE 12—ASSISTANCE BY VESSEL FOR SUPPRESSION OF ILLICIT TRAFFIC

1. Subject to paragraph 2 of this Article, a law enforcement vessel of a Party may follow a suspect vessel into the waters of another Party and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the other Party if either:
  - a. the Party has received authorisation from the authority or authorities of the other Party defined in Article 1 and notified pursuant to Article 7; or
  - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel of the other Party is immediately available to investigate. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
2. Parties shall elect either the procedure set forth in paragraph 1a or 1b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 1a.
3. If evidence is found of illicit traffic, the authorising Party shall be promptly informed of the results of the search. The suspect vessel, cargo and persons on board shall be detained and taken to a designated port within the waters of the authorising Party unless otherwise directed by that Party.

4. Subject to paragraph 5, a law enforcement vessel of a Party may follow a suspect aircraft into another Party's waters in order to maintain contact with the suspect aircraft if either:
  - a. the Party has received authorisation from the authority or authorities defined in Article 1 and notified pursuant to Article 7; or
  - b. on notice to the other Party, when no embarked law enforcement official or law enforcement vessel or law enforcement aircraft of the other Party is immediately available to maintain contact. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.
5. Parties shall elect either the procedure set forth in paragraph 4a or 4b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 4a.

#### ARTICLE 13—ASSISTANCE BY AIRCRAFT FOR SUPPRESSION OF ILLICIT TRAFFIC

1. A Party may request aircraft support from other Parties for assistance, including monitoring and surveillance, in suppressing illicit traffic.

\* \* \* \*

6. Subject to paragraph 7 of this Article, the requesting Party shall authorise aircraft of a requested Party, when engaged in law enforcement operations or activities in support of law enforcement operations, to fly over its territory and waters; and, subject to the laws of the authorising Party and of the requested Party, to relay to suspect aircraft, upon the request of the authorising Party, orders to comply with the instructions and directions from its air traffic control and law enforcement authority, if either:
  - a. authorisation has been granted by the authority or authorities of the Party requesting assistance defined in Article 1, notified pursuant to Article 7; or
  - b. advance authorisation has been granted by the Party requesting assistance.

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7. Parties shall elect either the procedure set forth in paragraph 6a or 6b, and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 6a.
8. Nothing in this Agreement shall affect the legitimate rights of aircraft engaged in scheduled or charter operations for the carriage of passengers, baggage or cargo or general aviation traffic.
9. Nothing in this Agreement shall be construed as authorising aircraft of any Party to enter the air space of any State not party to this Agreement.
10. Nothing in this Agreement shall be construed as authorising an aircraft of one Party independently to patrol within the air space of the other Party.
11. While conducting air activities pursuant to this Agreement, the Parties shall not endanger the lives of persons on board or the safety of civil aviation.

\* \* \* \*

### ARTICLE 16—BOARDING

1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.
2. Upon signing, ratification, acceptance or approval of this Agreement, a Party may notify the Depositary that vessels claiming the nationality of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party. This notification will not set aside the obligation of that Party to respond expeditiously to requests from other Parties pursuant to this Agreement, according to its capability. The notification can be withdrawn at any time.

3. Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that Parties shall be deemed to be granted authorisation to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board in order to determine if the vessel is engaged in illicit traffic, if there is no response or the requested Party can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to Article 6. The notification can be withdrawn at any time.
4. A flag State Party that has notified the Depositary that it shall adhere to paragraph 2 or 3 of this Article, having received a request to verify the nationality of a suspect vessel, may authorise the requesting Party to take all necessary actions to prevent the escape of the vessel.
5. When evidence of illicit traffic is found as the result of any boarding conducted pursuant to this Article, the law enforcement officials of the boarding Party may detain the vessel, cargo and persons on board pending expeditious disposition instructions from the flag State Party. The boarding Party shall promptly inform the flag State Party of the results of the boarding and search conducted pursuant to this Article in accordance with paragraph 1 of Article 26 of this Agreement.
6. Notwithstanding the foregoing paragraphs of this Article, law enforcement officials of one Party may board a suspect vessel located seaward of the territorial sea of any State, claiming the nationality of another Party for the purpose of locating and examining the documents of that vessel when:
  - a. it is not flying the flag of that other Party;
  - b. it is not displaying any marks of its registration;
  - c. it is claiming to have no documentation regarding its nationality on board; and
  - d. there is no other information evidencing nationality.
7. In the case of a boarding conducted pursuant to paragraph 6 of this Article, should any documentation or evidence of nationality be found, paragraph 1, 2 or 3 of this Article shall apply as appropriate. Where no evidence of nationality is found, the

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boarding Party may assimilate the vessel to a ship without nationality in accordance with international law.

8. The boarding and search of a suspect vessel in accordance with this Article is governed by the laws of the boarding Party.

\* \* \* \*

Declarations by the United States related to these provisions and contained in its signing statement follow.

\* \* \* \*

5. Pursuant to paragraph 2 of Article 12 of the Agreement, the United States elects the procedures set forth in paragraph 1(a) of Article 12. Accordingly, the United States understands that a law enforcement vessel of a Party may follow a suspect vessel into the waters of the United States in the Caribbean area and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the United States once the Party has received authorization from the Commander, Seventh Coast Guard District.

6. Pursuant to paragraph 5 of Article 12 of the Agreement, the United States elects the procedures set forth in paragraph 4(a) of Article 12. Accordingly, the United States understands that a law enforcement vessel of a Party may follow a suspect aircraft into the waters of the United States in the Caribbean area in order to maintain contact with the suspected aircraft once the Party has received authorization from the Commander, Seventh Coast Guard District.

7. Pursuant to paragraph 7 of Article 13 of the Agreement, the United States elects the procedures set forth in paragraph 6(a) of Article 13. Accordingly, the United States understands that it may authorize aircraft of a Party, when engaged in law enforcement operations or activities in support of law enforcement operations, to fly over United States territory and waters when authorization has been granted by the Commander, Seventh Coast Guard District. The United States understands further that, subject to the laws of the United States and of the requested Party, the requested Party may, upon the request of the Commander, Seventh Coast Guard District, relay to suspect aircraft orders to comply with the instruc-



tions and directions from air traffic control and law enforcement authorities of the United States.

8. Pursuant to paragraph 2 of Article 16 of the Agreement, the United States elects the procedures set forth in paragraph 3 of Article 13. Accordingly, the United States understands that Parties shall be deemed to be granted authorization to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board in order to determine if the vessel is engaged in illicit traffic, if there is no response or the United States can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to Article 6 of the Agreement.

\* \* \* \*

#### **4. Transnational Organized Crime, Trafficking in Persons, and Smuggling of Migrants**

##### ***a. Transnational organized crime convention with protocols***

On September 6, 2005, the Senate provided advice and consent to ratification of the United Nations Convention Against Transnational Organized Crime ("Organized Crime Convention") and two protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol"), and the Protocol Against Smuggling of Migrants by Land, Sea and Air ("Smuggling Protocol"). 151 CONG. REC. S9644 (2005). *See* S. Treaty Doc. No. 108-16 (2004) and *Digest 2004* at 99-103, 141-63, and 201-02. The Senate's advice and consent was conditioned on several reservations, understandings, and declarations to each of the instruments. The convention and both protocols entered into force for the United States on December 3, 2005.

Excerpts below from the resolution of advice and consent to ratification adopted by the Senate set forth the conditions applicable to the Organized Crime Convention.

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\* \* \* \*

a) Reservations.—The advice and consent of the Senate under section 1 is subject to the following reservations relative to the Convention, which shall be included in the United States instrument of ratification:

(1) The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose.

Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.

(2) The United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b) with respect to the offenses established in the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States will implement paragraph 1(b) to the extent provided for under its federal law.

(3) In accordance with Article 35, paragraph 3, the United States of America declares that it does not consider itself bound by

the obligation set forth in Article 35, paragraph 2 [providing for referral of unresolved disputes to the International Court of Justice].

(b) Declaration.—The advice and consent of the Senate under section 1 is subject to the following declaration relative to the Convention:

The United States of America declares that, in view of its federalism reservation, current United States law, including the laws of the States of the United States, fulfills the obligations of the Convention for the United States. Accordingly, the United States of America does not intend to enact new legislation to fulfill its obligations under the Convention.

The resolution of advice and consent to ratification also applied these conditions in substantially the same language to the Trafficking Protocol (with the addition of specific references to the Thirteenth Amendment to the U.S. Constitution in the federalism reservation in (a)(1)).

The following Understanding was added to the Trafficking Protocol:

... The United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention Against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with trafficking in persons.

As to the Smuggling Protocol, the Senate gave its advice and consent on the following conditions.

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(a) Reservations

(1) The United States of America criminalizes most but not all forms of attempts to commit the offenses established in accordance with Article 6, paragraph 1 of this Protocol. With respect to the obligation under Article 6, Paragraph 2(a), the United States of America reserves the

right to criminalize attempts to commit the conduct described in Article 6, paragraph 1(b), to the extent that under its laws such conduct relates to false or fraudulent passports and other specified identity documents, constitutes fraud or the making of a false statement, or constitutes attempted use of a false or fraudulent visa.

(2) In accordance with Article 20, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 20, paragraph 2.

(b) Understanding.—The advice and consent of the Senate under section 1 is subject to the following understanding relative to the Smuggling Protocol, which shall be included in the United States instrument of ratification: The United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention Against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with smuggling of migrants.

#### ***b. Trafficking in Persons Report***

On June 3, 2005, the Office to Monitor and Combat Trafficking in Persons, U.S. Department of State, released its fifth annual Trafficking in Persons Report, pursuant to § 110(b)(1) of the Trafficking Victim Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), as amended (“TVPA”). In her letter introducing the report, Secretary of State Condoleezza Rice noted:

This year, we included more country analyses as a result of deeper research and a wider range of sources. We also expanded our coverage of labor slavery, especially internal labor trafficking. Forced labor and involuntary servitude are appallingly common, including whole villages working to pay off old debts passed down through generations.

The 2005 report and related material are available at [www.state.gov/g/tip/rls/tiprpt/2005](http://www.state.gov/g/tip/rls/tiprpt/2005). The introduction to the report is excerpted below.

The annual Trafficking in Persons (TIP) Report includes those countries determined to be countries of origin, transit, or destination for a significant number of victims of severe forms of trafficking. Since trafficking likely extends to every country in the world, the omission of a country from the Report may only indicate a lack of adequate information. The country narratives describe the scope and nature of the trafficking problem, the reasons for including the country in the Report, and the government's efforts to combat trafficking. The narrative also contains an assessment of the government's compliance with the minimum standards for the elimination of trafficking as laid out in the Trafficking Victims Protection Act of 2000 (TVPA), and includes suggestions for actions to combat trafficking. The remainder of the country narrative describes the government's efforts to enforce laws against trafficking, protect victims, and prevent trafficking. Each narrative explains the basis for rating a country as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3. If a country has been placed on Tier 2 Watch List, the narrative will contain a statement explaining why, using terms found in the TVPA as amended in 2003.

... [C]onferences, plans, and task forces alone are not weighted heavily in assessing country efforts. Rather, the Report focuses on concrete actions governments have taken to fight trafficking: highlighting prosecutions, convictions, and prison sentences for traffickers, victim protection, and prevention efforts. The Report does not give great weight to laws in draft form or laws that have not yet been enacted. Finally, the Report does not focus on other government efforts that contribute indirectly to reducing trafficking, such as education programs, support for economic development, or programs aimed at enhancing gender equality, although these are worthwhile endeavors.

\* \* \* \*

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The report summarized the tiers into which countries are placed as follows:

**TIER 1:** Countries whose governments fully comply with the Act's minimum standards.

**TIER 2:** Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards.

\* \* \* \*

**TIER 3:** Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

In addition, it described the Special Watch List, created by statute in 2003, and the Tier 2 Watch List, as excerpted below.

\* \* \* \*

The 2003 reauthorization of the TVPA created a "Special Watch List" of countries on the TIP Report that should receive special scrutiny. The list is composed of: 1) countries listed as Tier 1 in the current Report that were listed as Tier 2 in the 2004 Report; 2) countries listed as Tier 2 in the current Report that were listed as Tier 3 in the 2004 Report; and, 3) countries listed as Tier 2 in the current Report, where

- a. The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
- b. There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or
- c. The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

This category [3] (including a, b, and c) has been termed by the Department of State “Tier 2 Watch List.”

In remarks to the press, Ambassador John R. Miller, Senior Advisor on Trafficking in Persons, commented on the focus in 2005 on forced labor trafficking as follows:

When we look at slavery worldwide, we believe sex slavery is the largest category of transnational slavery. It is intrinsically linked to prostitution and we find that where prostitution is encouraged, the number of victims increases. That is why to combat sex slavery, we are urging a greater focus on demand, educating and dissuading the so-called customers. But while sex slavery is large, we are concerned with all forms of slavery. This year, trafficking through labor exploitation, particularly involuntary servitude of foreign laborers, received greater attention. This greater emphasis came as a result of better data obtained from source countries and nongovernmental organizations. Four countries are placed on Tier 3 for their failure primarily to make significant efforts to combat forced labor trafficking: Saudi Arabia, Kuwait, Qatar and the United Arab Emirates.

Mr. Miller’s remarks are available at [www.state.gov/g/tip/rls/rm/2005/47210.htm](http://www.state.gov/g/tip/rls/rm/2005/47210.htm); see also fact sheet released by the Department of State on July 25, 2005, “The Facts About Human Trafficking for Forced Labor,” available at [www.state.gov/g/tip/rls/fs/2005/50861.htm](http://www.state.gov/g/tip/rls/fs/2005/50861.htm). Other fact sheets related to trafficking in persons, including a January 1, 2005, fact sheet “Distinctions Between Human Smuggling and Human Trafficking,” are available at [www.state.gov/g/tip/rls/fs/](http://www.state.gov/g/tip/rls/fs/).

**c. *Special Watch List Interim Assessment***

Prior to the 2005 TIP report, the Department of State issued the first Trafficking in Persons (“TIP”) Interim Assessment of countries on the Special Watch List, pursuant to § 110(b)(3), 22 U.S.C. § 7107(b), added by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-179, 117

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Stat. 2643. *See* 4.b. *supra* for description of the Special Watch List. This interim assessment of countries included on the 2004 Special Watch List was provided to congressional committees on January 3, 2005. The interim assessment of countries on the 2005 Special List will be submitted to the same committees early in 2006.

The introduction to the interim assessment, set forth below, explains its purpose. The full text of the report is available at [www.state.gov/g/tip/rls/rpt/40244.htm](http://www.state.gov/g/tip/rls/rpt/40244.htm).

The Trafficking Victims Protection Reauthorization Act, passed by the Congress and signed into law by the President in December 2003, requires the Department of State to submit to the Congress an Interim Assessment of the progress made by countries on the September 2004 Special Watch List to combat trafficking in persons (TIP) since the June 2004 annual report.

\* \* \* \*

The Interim Assessment is intended to serve as a tool by which to gauge the anti-trafficking progress of countries that are in danger of slipping a tier in the upcoming June 2005 TIP Report, particularly those in danger of slipping to Tier 3. It serves as a tightly focused progress report, assessing progress a government has made in addressing the relevant country's key deficiencies highlighted in the June 2004 TIP Report. The Interim Assessment concentrates on concrete actions governments have taken since the annual June 2004 TIP Report. Effectively this is a May through November timeframe, given the time that is needed to draft and publish the June TIP Report and this Interim Assessment. Readers are requested to refer back to the annual TIP Report for an analysis of large scale efforts and a description of the trafficking problem in each particular country.

### ***d. Presidential determination***

Section 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107 (2000), requires the President to submit a notification of one of four specified determinations



with respect to “each foreign country whose government, according to [the annual report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance.” The four determination options are set forth in § 110(d)(1)-(4).

On September 21, 2005, President Bush issued Presidential Determination No. 2005-37 with Respect to Foreign Governments’ Efforts Regarding Trafficking in Persons in a memorandum for the Secretary of State. 70 Fed. Reg. 57,481 (Sept. 30, 2005). The Presidential Determination is also available, together with the Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to “Tier 3” Countries, at [www.state.gov/g/tip/rls/prsrl/2005/53777.htm](http://www.state.gov/g/tip/rls/prsrl/2005/53777.htm).

The memorandum of justification summarizes the determinations made by the President, as excerpted below, and provides an explanation for treatment of each of the fourteen countries. *See also* release entitled Trafficking in Persons: Country Reassessments, September 22, 2005, available at [www.state.gov/g/tip/rls/other/53913.htm](http://www.state.gov/g/tip/rls/other/53913.htm).

The President has made determinations regarding the fourteen countries placed on Tier 3 of the State Department’s 2005 annual Report on Trafficking in Persons. The President has determined to sanction Burma, Cambodia, Cuba, the Democratic People’s Republic of Korea (DPRK), and Venezuela. The United States will not provide funding for participation by officials or employees of the governments of Burma, Cuba, and the DPRK in educational and cultural exchange programs until such government complies with the Act’s minimum standards to combat trafficking or makes significant efforts to do so. The United States will not provide certain non-humanitarian, non-trade-related assistance to the governments of Cambodia and Venezuela until such government complies with the Act’s minimum standards to combat trafficking or makes significant efforts to do so. Furthermore, the President determined, consistent with the Act’s waiver authority, that provision of certain bilateral and multilateral assistance to the governments of Cambo-

dia and Venezuela would promote the purposes of the Act or is otherwise in the national interest of the United States. The President also determined, consistent with the Act's waiver authority, that provision of all bilateral and multilateral assistance to Ecuador, Kuwait, and Saudi Arabia that otherwise would have been cut off would promote the purposes of the Act or is otherwise in the national interest of the United States.

The determinations also indicate the Secretary of State's subsequent compliance determinations regarding Bolivia, Jamaica, Qatar, Sudan, Togo, and the United Arab Emirates. It is important that six of the fourteen Tier 3 countries took actions that averted the need for the President to make a determination regarding sanctions and waivers. Information highlighted in the Trafficking in Persons report and the possibility of sanctions, in conjunction with our diplomatic efforts, encouraged these countries' governments to take important measures against trafficking.

Section 110(d)(1)(B) of the Act interferes with the President's authority to direct foreign affairs. We, therefore, interpret it as precatory. Nonetheless, it is the policy of the United States that, consistent with the provisions of the Act, the U.S. Executive Director of each multilateral development bank, as defined in the Act, and of the International Monetary Fund will vote against, and use the Executive Director's best efforts to deny any loan or other utilization of the funds of the respective institution to the governments of Burma, Cambodia, Cuba, the DPRK, and Venezuela (with specific exceptions for Cambodia and Venezuela) for Fiscal Year 2006, until such a government complies with the minimum standards or makes significant efforts to bring itself into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act.

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***e. Sexual exploitation***

On March 11, 2005, the UN Commission on the Status of Women adopted by consensus a resolution introduced by the United States, "Eliminating Demand for Trafficked Women and Girls for All Forms of Exploitation." Resolution 49/2,

E/CN.6/2005/11 at page 20. In a fact sheet dated March 18, 2005, the Department of State Office to Monitor and Combat Trafficking Persons, explained as follows.

An estimated 75 percent of all victims of human trafficking are trafficked for sexual exploitation (Collecting Data on Human Trafficking, Kristiina Kangaspunta, United Nations Office on Drugs and Crime). To fully fight this crime, the world must increase attention not only on the root causes that leave people vulnerable to trafficking, but also on eliminating the demand for commercial sexual exploitation—which overwhelmingly impacts women and girls and fuels the growth of human trafficking. Simply put, we must dry up the “market” for victims if we are serious about ending human trafficking.

At the 2005 UN Commission on the Status of Women (CSW), the United States presented a resolution to highlight this need. The resolution, Eliminating Demand for Trafficked Women and Girls for All Forms of Exploitation, attracted more than 50 nations as co-sponsors and was adopted by consensus on March 11, 2005.

... This was the first resolution of a UN body to focus on eliminating demand for human trafficking, and, with this resolution, the CSW also acknowledged the important link between commercial sexual exploitation and trafficking in women and girls.

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The full text of the fact sheet, including the text of the resolution, is available at [www.state.gov/g/tip/rls/fs/2005/43630.htm](http://www.state.gov/g/tip/rls/fs/2005/43630.htm).

In a March 8, 2005, briefing for non-governmental organizations on the U.S. international response to trafficking, Laura J. Lederer, Senior Advisor on Trafficking, Office for Global Affairs, Department of State, commented as excerpted below; her remarks are available at [www.state.gov/g/tip/rls/rm/2005/46562.htm](http://www.state.gov/g/tip/rls/rm/2005/46562.htm). A White House press release dated February 25, 2003, on NSPD-22, referred to below, is available at [www.state.gov/g/tip/rls/other/17966.htm](http://www.state.gov/g/tip/rls/other/17966.htm).

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The more we examined these two types of trafficking [sex trafficking and labor trafficking], the more we were convinced that though similar in some general ways, they are very different in others. For example, the elements of the crimes of sex trafficking and labor trafficking are different; the victims are different; the type of abuse is different. Consequently, the programs to address these different kinds of trafficking are also different . . .

\* \* \* \*

In the [February 2003] National Security Presidential Directive on Trafficking in Persons (NSPD-22), signed by President Bush, he lays out this new policy perspective. Essentially, the NSPD links trafficking and prostitution. It states that the U.S. Government believes prostitution is inherently harmful to men, women, and children, and that because it contributes to the phenomenon of trafficking, the U.S. opposes legalizing prostitution or considering it a legitimate form of work. It calls for each agency to examine its personnel, programmatic, grant-making, and other programs and to incorporate this new policy into strategic plans to address trafficking.

We hope this new policy will serve as an alternative to the approach of some of the countries that have legalized prostitution. . . .

### 5. Cybercrime

On November 8, 2005, the Senate Foreign Relations Committee recommended that the Senate give its advice and consent to ratification of the Council of Europe Convention on Cybercrime with certain reservations and declarations. At the end of 2005 the Senate had not taken action. *See also* S. Exec. Rpt. 109-6 (2005) *and* S. Treaty Doc. No. 108-11 (2003) transmitting the treaty from the President to the Senate, discussed in *Digest 2003* at 191-207.

### 6. Corruption: UN Corruption Convention

On October 27, 2005, President George W. Bush transmitted the United Nations Convention Against Corruption, adopted by the UN General Assembly on October 31, 2003, to the Senate for advice and consent to ratification. S. Treaty Doc. No.

109-6 (2005). The United States participated actively in the negotiations and signed the Convention at Merida, Mexico, on December 9, 2003.

On September 23, 2005, Secretary of State Condoleezza Rice submitted the treaty to President Bush for transmittal to the Senate. Excerpts follow from Secretary Rice's letter and the accompanying report of the Department of State, both of which are included in S. Treaty Doc. No. 109-6.

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I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the United Nations ("UN") Convention Against Corruption (the "Corruption Convention" or the "Convention"), which was adopted by the UN General Assembly on October 31, 2003. . . .

Accompanying the Convention are interpretative notes for the official records of the negotiations (or "*travaux préparatoires*"). They were prepared by the Secretariat of the Ad Hoc Committee that conducted the negotiations, based on discussions that took place throughout the process of negotiations. These notes would be submitted to the Senate for its information.

\* \* \* \*

The Corruption Convention is the first multilateral treaty to comprehensively address, on a global basis, the problems relating to corruption. It expands the obligations contained in Articles 8 and 9 of the UN Convention Against Transnational Organized Crime, which relate to corruption, and complements existing regional anti-corruption instruments by expanding provisions to criminalize and prevent corruption and by providing procedures for governments to recover assets that have been illicitly acquired by corrupt officials. It also reflects and builds upon many of the provisions set forth in the Organization for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Corruption Convention establishes a treaty-based regime of obligations to provide mutual legal assistance that is analogous to those contained in other law enforcement treaties to which the United States is a party. The Convention thus would enhance the ability of the United States to

render and receive assistance on a global basis in the common struggle to prevent, investigate, and prosecute certain acts of corruption and in efforts to recover illicitly obtained assets.

A detailed, article-by-article analysis of the Convention is attached to this report. Included in that analysis are two reservations, an understanding, [and] declarations that the Senate is being asked to include in its resolution of advice and consent. As further discussed in the analysis attached to this report, if the United States makes the proposed reservations, the existing body of federal and state law and regulations will be adequate to satisfy the Convention's requirements for legislation, and, thus, further legislation will not be required for the United States to implement the Convention.

\* \* \* \*

The following is a detailed analysis of the provisions of the United Nations Convention Against Corruption, which consists of seventy-one articles divided among eight chapters: (1) "General provisions"; (2) "Preventive measures"; (3) "Criminalization and law enforcement"; (4) "International co-operation"; (5) "Asset recovery"; (6) "Technical assistance and information exchange"; (7) "Mechanisms for implementation"; and (8) "Final provisions." In addition, the following discussion contains, where relevant, a description of two proposed reservations, a proposed understanding, and two proposed declarations.

*Chapter I—General Provisions (Articles 1-4)*

Article 1 ("Statement of Purpose") states that the purposes of the Convention are to promote and strengthen measures to prevent and combat corruption; facilitate international cooperation and technical assistance in the prevention of and fight against corruption; and promote integrity, accountability, and the proper management of public affairs and public property.

Article 2 ("Use of terms") defines nine terms used in the Convention. In particular, the defined terms "public official" and "foreign public official" are crucial to understanding the scope of the Convention, since both the preventive measures and criminalization chapters of the Convention use these terms in describing the type of government position toward which a State Party must direct certain measures.

The Convention's definition of "public official" gives significant deference to a State Party's domestic law and practice in determining which group of persons must be covered by certain preventive measures and criminalization provisions. A "public official" is, for purposes of most of the Convention, defined as any one of three categories of persons: (1) a person holding a legislative, executive, administrative, or judicial office of the State Party concerned; (2) any other person who performs a public function or provides a public service, as defined by and applied in the domestic law of the State Party; and (3) any other person defined as a "public official" in the domestic law of such State Party. However, for purposes of "some specific measures" in the chapter on prevention of the Convention, a State Party may define "public official" as any person who performs a public function or provides a public service, as that term is defined and applied under the law of that State Party. In addition to these references to a State Party's law, the interpretative notes make clear that each State Party shall determine which persons are members of the three categories set forth in the first part of the definition. Furthermore, the *travaux préparatoires* indicate that for countries with subnational units of a self-governing nature, it is up to the State Party whether the term "office" is considered to apply to positions at the subnational level. Accordingly, there is significant discretion for federal states such as the United States in applying the term "public official."

A "foreign public official" is defined as any person holding a legislative, executive, administrative, or judicial office of a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country. This definition, which is important for the provision in the Convention that requires each State Party to criminalize bribery of foreign public officials, provides clear guidance to each State Party as to which kind of foreign officials must be covered by that criminal law.

Article 3 ("Scope of application") elaborates the ambit of the Convention. In general, the Convention applies to the prevention, investigation, and prosecution of corrupt acts and to the freezing, seizure, confiscation, and return of proceeds of offenses established in accordance with the Convention.

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One issue that arises throughout the Convention is the question of how it can be implemented consistent with the United States' federal system. With respect to the articles of the Convention that require States Parties to establish criminal offenses or related measures if they have not already done so (in particular Articles 15, 16, 17, 23, 25, 27, 29, 31-32, 35-37), it should be noted preliminarily that these obligations apply at the national level. Existing U.S. federal criminal law has limited scope, generally covering conduct involving interstate or foreign commerce or another important federal interest. Under our fundamental principles of federalism, offenses of a local character are generally within the domain of the states, but not all forms of conduct proscribed by the Convention are criminalized by all U.S. states in the form set forth by the Convention. (For example, some states may not criminalize all of the forms of conduct set forth under Article 25 ("Obstruction of justice").) Thus, in the absence of a reservation, there would be a narrow category of such conduct that the United States would be obligated under the Convention to criminalize, although under our federal system such obligations would generally be met by state governments rather than the federal government.

The obligations set forth in the Convention in the area of preventive measures are generally more flexible than those found in the chapter on criminalization. Nevertheless, it should be noted that preventive measures addressing the conduct of state and local officials are generally handled at the state and local level. While the states generally regulate their own affairs in a manner consistent with the obligations set forth in the chapter on preventive measures in the Convention, in some cases they may do so in a different manner. Therefore, in the absence of a reservation, there may be some preventive measures the United States would be required to implement under the Convention that are not fully addressed at the state level, for example potentially under Articles 6, 9, 12, and 13. In order to avoid such obligations in the criminalization and preventive measures areas, the following reservation is recommended to be included in the Senate's resolution of advice and consent:

The Government of the United States of America reserves the right to assume obligations under this Convention in a manner consistent with its fundamental principles of feder-



alism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as an important component of the legal regime within the United States for combating corruption and is broadly effective for this purpose. Federal criminal law does not apply where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest. There are conceivable situations involving offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. Similarly, in the U.S. system, the states are responsible for preventive measures governing their own officials. While the states generally regulate their own affairs in a manner consistent with the obligations set forth in the chapter on preventive measures in the Convention, in some cases they may do so in a different manner. Accordingly, there may be situations where state and federal law will not be entirely adequate to satisfy an obligation in Chapters II and III of the Convention. The Government of the United States of America therefore reserves to the obligations set forth in the Convention to the extent they (1) address conduct that would fall within this narrow category of highly localized activity or (2) involve preventive measures not covered by federal law governing state and local officials. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other States Parties in accordance with the provisions of the Convention.

Furthermore, in connection with this reservation, it is recommended that the Senate include the following understanding in its resolution of advice and consent:

The United States understands that, in view of its federalism reservation, the Convention does not warrant the enactment of any legislative or other measures; instead, the

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United States will rely on existing federal law and applicable state law to meet its obligations under the Convention.

\* \* \*

### *Chapter II—Preventive measures (Articles 5-14)*

Chapter II contains a set of measures against corruption—other than criminalization—that States Parties are to take to minimize the opportunity for corrupt acts to occur in the first place. Many of the articles in the chapter expressly provide that such measures are to be undertaken in accordance with the fundamental legal principles of each State Party's legal system. Most measures are directed toward corruption in the public sector, although the chapter also contains provisions to prevent corruption in the private sector and to promote the participation of civil society in the fight against corruption. Many of the obligations set forth in these articles include possible examples of ways in which a State Party might implement those obligations, although the specifics of such measures are left to the individual State Party.

As noted above it is recommended that the United States take a reservation to the obligations of this chapter to enable its implementation consistent with our federal system. With this reservation, the United States can implement the obligations of this chapter under existing law.

\* \* \*

### *Chapter III—Criminalization and law enforcement (Articles 15-42)*

Chapter III contains three types of provisions: substantive provisions under which a State Party must criminalize certain acts [Article 15, "Bribery of national public officials") Article 16 ("Bribery of foreign public officials and officials of public international organizations"), Article 17 ("Embezzlement, misappropriation or other diversion of property by a public official"), Article 23 ("Laundering of proceeds of crime"), and Article 25 ("Obstruction of justice")], provisions under which a State Party must merely consider criminalizing certain acts [Article 18 ("Trading in influence"); Article 19 ("Abuse of functions"), Article 20 ("Illicit enrichment"), Article 21 ("Bribery in the private sector"), Article 22 ("Embezzlement of property in the private sector"), and Article 24 ("Conceal-

ment”)); and provisions related to participation, attempt, and procedural issues such as jurisdiction and statutes of limitations.

As noted above, it is recommended that the United States take a reservation to the obligations of this chapter to enable its implementation consistent with the current distribution of criminal jurisdiction under our federal system. With this reservation and given the fact that a number of provisions of this chapter that might have given rise to gaps are non-obligatory (e.g., portions of Articles 16, 27, 30-32, 37, and 39; as well as the entirety of Articles 18-22, 24, 33, and 41) the United States can implement the obligations of this chapter under existing federal and state law.

\* \* \* \*

Article 35 would not have any direct effect on the potential exposure of U.S. companies or others in private litigation in the United States. The current laws and practices of the United States are in compliance with Article 35, and the United States does not construe Article 35 to require broadening or enhancing current U.S. law and practice in any way. U.S. jurisprudence permits persons who have suffered from criminal acts such as bribery to seek damages from the offenders under various theories. These remedies are sufficient to comply with this article. It should be noted that nothing in this article should be interpreted as requiring the United States to create a private right of action under the Foreign Corrupt Practices Act or as expanding the scope of the Alien Tort Statute to permit foreigners to litigate corruption claims in U.S. courts. The Convention does not itself suggest that corruption is a stand-alone violation of international law (but rather is something that States Parties should prohibit under their domestic law). Accordingly, this Convention does not signify that corruption is a norm that is specific, universal, and obligatory for purposes of the Alien Tort Statute. To avoid any potential confusion over these issues it is recommended below that the Senate include a declaration in its resolution of advice and consent that makes clear that the provisions of the Convention (with the exception of Articles 44 and 46) are non-self-executing. None of the provisions of the Convention creates a private right of action.

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Article 42 (“Jurisdiction”) lays out the jurisdictional principles governing the Convention’s mandatory criminalization proviso” generally. A State Party must establish jurisdiction in respect of offenses established in accordance with the Convention when committed in its territory or on board a vessel flying its flag or an aircraft registered under its laws. The latter jurisdiction (i.e., on board a vessel or aircraft) is not expressly extended under current U.S. law to these offenses—bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, money laundering, obstruction of justice, and participation—although certain cases can be pursued on other jurisdictional bases. For example, in most situations involving bribery of U.S. public officials, misappropriation of government property, or obstruction of U.S. investigations or proceedings, U.S. federal jurisdiction may extend over such offenses occurring outside the United States, either through an express statutory grant of authority (e.g., Title 18, United States Code, Sections 1512(h), 1956(f), 1957(d)), or, most frequently, through application of principles of statutory interpretation. However, since under current U.S. law we cannot always ensure our ability to exercise jurisdiction over these offenses if they take place outside our territory on such vessels or aircraft, a reservation will be required for those cases in which such jurisdiction is not available. Accordingly, it is recommended that the following reservation be included in the Senate’s resolution of advice and consent:

The Government of the United States of America reserves the right not to apply in part the obligation set forth in Article 42, paragraph 1(b) with respect to the offenses established in accordance with the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in many circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States shall implement paragraph 1(b) to the extent provided for under its federal law.

A State Party is permitted, but not required, to establish jurisdiction over the five offenses when committed against one of its nationals, by one of its nationals or residents, or against the State Party itself. (Nationality and passive personality jurisdiction is limited under U.S. law, but is common in European countries and other civil law jurisdictions.) Permissive jurisdiction is further envisioned over the offense of money laundering, as defined in the Convention, where it is committed outside a State Party's territory with a view to the commission of certain offenses within its territory.

Article 42 requires a State Party to establish its jurisdiction when it refuses to extradite an offender for offenses covered by the Convention solely because the person is one of its nationals. The United States extradites its nationals, so this provision will impose no new requirements on our legal system. It will, however, help ensure that States Parties that do not extradite their nationals take steps to ensure that participants in offenses related to corruption face justice there even for crimes committed abroad.

*Chapter IV—International cooperation (Articles 43-50)*

Article 44 ("Extradition") elaborates a regime for extradition of persons for offenses established in accordance with this Convention, as long as the offense is criminal under the laws of the requesting and the requested States Parties. The article provides that States Parties may make extradition conditional on a bilateral extradition treaty. Pursuant to this provision, for the United States, the Convention will not provide a substitute international legal basis for extradition, which will continue to be governed by U.S. domestic law and applicable bilateral extradition treaties, including their grounds for refusal. As such a State, the United States is obliged by Article 44(6) to so notify the UN Secretary-General. Accordingly, upon ratification of the Convention, the United States would notify the depositary that pursuant to Article 44(6) it will not apply Article 44, paragraph 5.

For the United States, the principal legal effect of this article would be to deem the offenses established in accordance with the Convention (i.e., the mandatory offenses) to be extraditable offenses under U.S. bilateral extradition treaties. The result would be to expand the scope of older U.S. bilateral extradition treaties that

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list extraditable offenses and were concluded at a time when offenses such as money laundering did not yet exist.

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Pursuant to Article 46 (“Mutual legal assistance”), States Parties are obligated to afford each other the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to offenses covered by this Convention. Pursuant to paragraph 6 of Article 46, where other international agreements governing mutual legal assistance exist between States Parties they shall be utilized and the Convention does not affect their provisions. This will be true for the United States in many instances, due to our extensive network of bilateral and regional mutual legal assistance treaties (“MLATs”). It is anticipated, however, that the United States will make and receive requests for mutual assistance under this Convention in a number of corruption-related cases involving States Parties with which we lack an applicable bilateral or regional agreement.

\* \* \* \*

Under paragraph 9 of Article 46, States Parties may (although they are encouraged not to) decline to render mutual legal assistance in certain cases on the ground of an absence of dual criminality. Where a request involves coercive action, matters of a *de minimis* nature, or matters for which the cooperation sought is available under other provisions of the Convention (such as law enforcement cooperation pursuant to Article 48), States Parties may decline to render assistance in the absence of dual criminality. However, where a request involves non-coercive action, States Parties are to provide mutual legal assistance unless inconsistent with the basic concepts of its legal system. Thus, in addition to the fundamental grounds for refusal set forth in other paragraphs, the United States could decline a request for non-coercive action where the offense is fundamentally at odds with U.S. notions of due process, presumption of innocence, or other basic tenets of U.S. jurisprudence.

As previously noted, Article 46 establishes certain modern procedures for mutual legal assistance that apply in the absence of another treaty between the Parties concerned. These include a re-

quirement to designate central authorities to handle requests. The Department of Justice, Criminal Division, Office of International Affairs, would serve as the Central Authority for the United States. . . .

\* \* \* \*

Article 46, paragraph 21, specifies four grounds for refusing mutual legal assistance: (a) if the request does not conform to the requirements of the Convention; (b) if the requested State Party considers that execution is likely to prejudice its sovereignty, security, *ordre public*, or other essential interests; (c) if domestic law in the requested State Party would prohibit the action requested with regard to any similar offense under its own jurisdiction; or (d) if granting the request would be contrary to the legal system of the requested State Party relating to mutual legal assistance. These grounds for refusal are broader than those generally included in U.S. MLATs, and, in view of the large number of countries that may become Party to the Convention, will serve to ensure that our mutual assistance practice under the Convention corresponds with sovereign prerogatives.

\* \* \* \*

*Chapter VIII—Final provisions (Articles 65-71)*

\* \* \* \*

Article 66 (“Settlement of disputes”) establishes a mechanism for States Parties to settle disputes concerning the interpretation or application of the Convention. If a dispute cannot be settled within a reasonable time through negotiation, a State Party may refer it to arbitration, or to the International Court of Justice if the Parties are unable to agree on the organization of the arbitration. A State Party may, however, opt out of dispute settlement mechanisms other than negotiation by making a declaration to that effect. In keeping with recent practice, the United States should do so. Accordingly, it is recommended that the following declaration be included in the Senate’s resolution of advice and consent:

In accordance with Article 66, paragraph 3, the Government of the United States of America declares that it does

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not consider itself bound by the obligation set forth in Article 66, paragraph 2.

\* \* \* \*

Finally, the terms of the Convention, with the suggested reservations, are consonant with U.S. law. To clarify that the provisions of the Convention, with the exceptions of Articles 44 and 46, are not self-executing, it is recommended that the Senate include the following declaration in its resolution of advice and consent:

The United States declares that the provisions of the Convention (with the exception of Articles 44 and 46) are non-self-executing. None of the provisions of the Convention creates a private right of action.

Article 44 and Article 46 of the Convention contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing.

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### 7. Money Laundering

#### a. *Latvia: Multibanka*

On April 26, 2005, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued a notice of proposed rulemaking under § 311 of the USA PATRIOT Act, Pub. L. 107-56, finding that reasonable grounds exist for concluding that Multibanka, a commercial bank in Latvia, "is a financial institution of primary money laundering concern." 70 Fed. Reg. 21,362 (Apr. 26, 2005). Based on this finding, the proposed rule would impose "the special measure authorized by 31 U.S.C. 5318A(b)(5). That special measure authorizes the prohibition of opening or maintaining correspondent accounts by any domestic financial institution or agency for or on behalf of a targeted financial institution."



Excerpts from the proposed rule below explain the action.

\* \* \* \*

*B. Multibanka*

\* \* \* \*

Multibanka is headquartered in Riga, the capital of the Republic of Latvia. . . .

Multibanka offers confidential banking services and numbered accounts for non-Latvian customers. Reports substantiate that a significant portion of its business involves wiring money out of the country on behalf of its accountholders.

The bank has been suspected of being used by Russian and other shell companies to facilitate financial crime. A common way for criminals to disguise illegal proceeds is to establish shell companies in countries known for lax enforcement of anti-money laundering laws. The criminals use the shell companies to conceal the true ownership of the accounts and assets, which is ideal for the laundering of funds. One reported scheme works in the following way: Suspect shell companies move money into their accounts at Multibanka. The money is designated as payment for goods and services to other shell companies or individuals, but is deposited into the originating company's account with Multibanka. Multibanka later transfers the funds to destinations outside Latvia upon the instructions of the originating shell companies. These transactions are suspected of being used to facilitate illegal transfers of money out of other countries and tax evasion. Due to concerns about transactions flowing through Multibanka involving suspected shell corporations, some U.S. financial institutions have already terminated correspondent relationships with Multibanka.

FinCEN also has reason to believe that certain criminals use accounts at Multibanka to facilitate financial fraud schemes. Specifically, one individual involved in financial fraud reported having success in carrying out large-sum transactions through his account at Multibanka. FinCEN is also aware that an individual arrested in 2004 for his involvement in an access device fraud ring used an account at Multibanka to launder proceeds of his criminal activities.

*C. Latvia*

Latvia's role as a regional financial center, the number of commercial banks with respect to its size, and those banks' sizeable non-resident deposit base continue to pose significant money laundering risks. Latvian authorities recently have sought tighter legislative controls, regulations, and "best practices" designed to fight financial crime. Despite Latvia's recent efforts and amended laws, however, money laundering in Latvia remains a concern. Latvia's geographical position, situated by the Baltic Sea and bordering Russia, Estonia, Belarus, and Lithuania, make it an attractive transit country for both legitimate and illegitimate trade. Sources of laundered money in these countries include counterfeiting, corruption, arms trafficking, contraband smuggling, and other crimes. It is believed that most of Latvia's narcotics trafficking is conducted by organized crime groups that began with cigarette and alcohol smuggling and then progressed to narcotics.

Of particular concern is that many of Latvia's institutions do not appear to serve the Latvian community, but instead serve suspect foreign private shell companies. As previously discussed, criminals frequently launder money through the use of shell companies. Similarly, a large number of foreign depositors or a large percentage of assets in foreign funds may indicate that a bank is being used to launder money or evade taxes. Latvia's 23 banks held approximately \$5 billion in nonresident deposits at the end of 2004, mainly from Russia and other parts of the former Soviet Union. These deposits accounted for more than half of all the money held in Latvian banks.

Despite growing efforts by the Latvian government for reform, material weaknesses in the implementation and enforcement of its anti-money laundering laws exist. To date there have been no forfeitures of illicit proceeds based on money laundering. In addition, suspicious activity reporting thresholds remain high, at nearly 40,000 LATS (about \$80,000 dollars) for most transactions, which fails to capture significant activity below this threshold. Furthermore, since 2004, only two money laundering cases have been tried in Latvian courts, with both cases ending in acquittals.

Latvia has a general reputation for permissive bank secrecy laws and lax enforcement, as evidenced by multiple non-Latvian

Web sites that offer to establish offshore accounts with Latvian banks in general, and Multibanka, in particular. The sites claim that Latvian banks offer secure and confidential banking, especially through online banking services. FinCEN also has reason to believe that certain Latvian financial institutions are used by online criminal groups, frequently referred to as “carding” groups, to launder the proceeds of their illegal activities. Such groups consist of computer hackers and other criminals that use the Internet as a means of perpetrating credit card fraud, identity theft, and related financial crimes. One of the primary concerns of carding group members is their ability to convert the funds obtained through fraud into cash. Anonymity is another major consideration for online criminals. Reports substantiate that in order to support these two needs, a significant number of carders have turned to Latvian financial institutions for the safe and quasi-anonymous cashing out of their illegal proceeds. FinCEN has additional reason to believe that certain Latvian financial institutions allow non-citizens to open accounts over the Internet, and offer anonymous ATM cards with high or no withdrawal limits.

Latvia has taken steps to address money laundering risks and corruption. In February 2004, a new anti-money laundering law removed some barriers that impeded the prosecution of money laundering. The law expanded the categories of financial institutions covered by reporting requirements to include auditors, lawyers, and high-value dealers, as well as credit institutions. The law also recognizes terrorism as a predicate offense for money laundering.

Recognizing the existence of widespread official corruption, the Latvian government, in January 2002, established the Anti-Corruption Bureau (ACB), an independent agency to combat public corruption by investigating and prosecuting Latvian officials involved in unlawful activities. In 2004, the ACB reviewed over 700 cases of suspected public corruption. Although this initiative is encouraging, FinCEN considers the high levels of corruption in Latvia’s Government and security forces an impediment both to its international information-sharing efforts and to the fair enforcement of Latvia’s anti-money laundering laws.

According to the International Narcotics Strategy Control Report (INSCR) published in March 2005 by the U.S. Department of

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State, Latvia's banking system is vulnerable to the laundering of narcotics proceeds. The report designates Latvia a jurisdiction of "primary concern." "Jurisdictions of Primary Concern" in INSCR are jurisdictions that are identified as "major money laundering countries," that is, countries "whose financial institutions engage in currency transactions involving significant amounts of proceeds from international narcotics trafficking."

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**b. *Macau: Banco Delta Asia***

On September 20, 2005, FinCEN published a notice of finding pursuant to § 311 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 31 U.S.C. § 5318A (2002), finding that "reasonable grounds exist for concluding that Banco Delta Asia SARL (Banco Delta Asia) is a financial institution of primary money laundering concern." 70 Fed. Reg. 55,214 (Sept. 20, 2005). Excerpts below from the Federal Register notice describe the basis for the action (footnotes omitted). The references in the finding to the money laundering risks in Macau are limited to that jurisdiction, and not applicable to the entire jurisdiction of China.

As with Multibanka, a proposed rule was issued, in this case by separate notice, to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against Banco Delta Asia. 70 Fed. Reg. 55,217 (Sept. 20, 2005).

\* \* \* \*

**B. *Banco Delta Asia***

Banco Delta Asia, located and licensed in the Macau Special Administrative Region, China, is the commercial banking arm of its parent company, Delta Asia Group (Holdings) Ltd. (Delta Asia Group). . . .

**C. *Macau***

Money laundering has been identified as a significant problem in the Macau Special Administrative Region, China. According to

the International Narcotics Strategy Control Report (INSCR) published in March 2005 by the U.S. Department of State, Macau's lack of adequate controls and regulatory oversight of the banking and gaming industries (many of which are associated with organized criminal activity) has led to an environment that can be exploited by money launderers. Moreover, the March 2005 INCSR designates Macau as a "jurisdiction of primary concern." The International Monetary Fund (IMF) conducted a study in 2002 concluding that, despite its anti-money laundering legal framework, Macau was "materially non-compliant" in terms of monitoring and reporting of suspicious financial transactions. Of special concern is Macau's lack of cross-border currency reporting requirements. In 2003, Macau prepared money laundering legislation that sought to incorporate the Financial Action Task Force's revised Forty Recommendations on Money Laundering, and to establish a Financial Intelligence Unit. Such legislation has not been adopted and the Financial Intelligence Unit has not been established. As noted in a 2004 IMF study, significant vulnerabilities remain in Macau, although it has made progress in its anti-money laundering regime in the past several years, including the establishment of a Fraud Investigation Section to examine suspicious transactions reports filed by financial institutions.

Government agencies and front companies of the Democratic People's Republic of Korea (DPRK or North Korea) that are engaged in illicit activities use Macau as a base of operations for money laundering and other illegal activities. For example, banks in Macau have allowed these organizations to launder counterfeit currency and the proceeds from government-sponsored illegal drug transactions.

#### *D. North Korea*

The involvement of North Korean government agencies and front companies in a wide variety of illegal activities, including drug trafficking and counterfeiting of goods and currency, has been widely reported. Earnings from criminal activity, by their clandestine nature, are difficult to quantify, but studies estimate that proceeds from these activities amount to roughly \$500 million annually.

Customs and police officials of many countries have regularly apprehended North Korean diplomats or quasi-official representa-

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tives of state trading companies trying to smuggle narcotics. For example, in December 2004, Turkish officials arrested two North Korean diplomats in Turkey in possession of illegal drugs valued at \$7 million. Earlier that year, Egyptian authorities expelled two other North Korean diplomats who attempted to deliver a shipment of controlled substances valued at \$150,000 in Egypt. In fact, since 1990, North Korea has been positively linked to nearly 50 drug seizures in 20 different countries, a significant number of which involved the arrest or detention of North Korean diplomats or officials. Proceeds from narcotics trafficking may amount to between \$100 million and \$200 million annually.

During the past three decades, there also have been many incidents and arrests involving North Korean officials for distributing supernotes. Since first detected, the United States has taken possession of more than \$45 million of these highly deceptive counterfeit notes.

Substantial evidence exists that North Korean governmental entities and officials launder the proceeds of narcotics trafficking, counterfeit activities, and other illegal activities through a network of front companies that use financial institutions in Macau for their operations.

### II. Analysis of Factors

Based upon a review and analysis of relevant information, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Secretary has determined that reasonable grounds exist for concluding that Banco Delta Asia is a financial institution of primary money laundering concern. A discussion of the section 311 factors relevant to this finding follows:

#### *1. The Extent to Which Banco Delta Asia Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction*

The Secretary has determined, based upon a variety of sources, that Banco Delta Asia is used to facilitate or promote money laundering and other financial crimes. Banco Delta Asia has provided financial services for over 20 years to multiple North Korean government agencies and front companies that are engaged in illicit ac-

tivities, and continues to develop these relationships. In fact, such account holders comprise a significant amount of Banco Delta Asia's business. Banco Delta Asia has tailored its services to the DPRK's demands. For example, sources show that the DPRK pays a fee to Banco Delta Asia for financial access to the banking system with little oversight or control. The bank also handles the bulk of the DPRK's precious metal sales, and helps North Korean agents conduct surreptitious, multi-million dollar cash deposits and withdrawals. Banco Delta Asia's questionable relationship with the DPRK is further demonstrated by its maintenance of an uninterrupted banking relationship with one North Korean front company despite the fact that the head of the company was charged with attempting to deposit large sums of counterfeit currency into Banco Delta Asia and was expelled from Macau. Although this same person later returned to his previous leadership position at the front company, services provided by Banco Delta Asia were not discontinued.

Banco Delta Asia's special relationship with the DPRK has specifically facilitated the criminal activities of North Korean government agencies and front companies. For example, sources show that senior officials in Banco Delta Asia are working with DPRK officials to accept large deposits of cash, including counterfeit U.S. currency, and agreeing to place that currency into circulation. Additionally, it has been widely reported that one well-known North Korean front company that has been a client of Banco Delta Asia for over a decade has conducted numerous illegal activities, including distributing counterfeit currency and smuggling counterfeit tobacco products. In addition, the front company has also long been suspected of being involved in international drug trafficking.

Moreover, Banco Delta Asia facilitated several multi-million dollar wire transfers connected with alleged criminal activity on behalf of another North Korean front company.

In addition to facilitating illicit activities of the DPRK, investigations have revealed that Banco Delta Asia serviced a multi-million dollar account on behalf of a known international drug trafficker.

*2. The Extent to Which Banco Delta Asia Is Used for Legitimate Business Purposes in the Jurisdiction*

It is difficult to determine the extent to which Banco Delta Asia is used for legitimate purposes. Most banking transactions within Macau are conducted by the jurisdiction's largest banks, while Banco Delta Asia ranks as one of the smallest in Macau. Although Banco Delta Asia likely engages in some legitimate activity, the Secretary believes that any legitimate use of Banco Delta Asia is significantly outweighed by its use to promote or facilitate money laundering and other financial crimes.

*3. The Extent to Which Such Action Is Sufficient To Ensure, With Respect to Transactions Involving Banco Delta Asia, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes*

As detailed above, the Secretary has reasonable grounds to conclude that Banco Delta Asia is being used to promote or facilitate international money laundering, and is therefore an institution of primary money laundering concern. Currently, there are no protective measures that specifically target Banco Delta Asia. Thus, finding Banco Delta Asia to be a financial institution of primary money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under section 311, is a necessary first step to prevent Banco Delta Asia from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring criminal conduct occurring at or through Banco Delta Asia to the attention of the international financial community and, it is hoped, further limit the bank's ability to be used for money laundering or for other criminal purposes.

**8. Hostage-taking**

On April 19, 2005, the United States joined consensus on UN Commission on Human Rights Resolution 2005/31 on Hostage-Taking. U.S. Mission Legal Adviser T. Michael Peay provided the following statement of U.S. support for the resolution which, among other things, reaffirmed "that hos-



tage-taking, wherever and by whomever committed, is a serious crime aimed at the destruction of human rights and is, under any circumstances, unjustifiable, including when committed under the pretext of achieving the goal of promoting and protecting human rights” and called upon states “to take all necessary measures” in accordance with international law to “prevent, combat and punish acts of hostage-taking.”

Mr. Peay’s statement is set forth in full below and available at [www.humanrights-usa.net/2005/0419EOPHosageL44.htm](http://www.humanrights-usa.net/2005/0419EOPHosageL44.htm).

The United States wishes to take this opportunity to underscore certain elements in the hostage-taking resolution (L.44). We are aware that some in the international community contend that persons who genuinely believe, or simply perceive, that their human rights have been violated feel justified in resorting to hostage-taking as a form of protest, protection, or retribution. Such rationales for hostage-taking are, in our view, always illegitimate and must always be rejected.

In conformity with the international commitments that they have assumed, States have the duty under international law to protect and implement human rights, and to punish human rights violations in accordance with applicable law. When non-State actors resort to hostage-taking, they are engaging in nothing more than criminal acts that must be condemned, and all the more so when such acts indiscriminately target or injure civilians.

These fundamental principles, Mr. Chairman, represent important pillars that continue to shape my Government’s position on the issue of terrorism, including acts of hostage-taking. For these reasons, the United States is pleased to join consensus on L.44. Thank you.

## **9. U.S. Jurisdiction and Related Issues**

### ***a. Military Extraterritorial Jurisdiction Act of 2000***

The Department of Defense issued a final rule, effective March 3, 2005, to implement the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”), 18 U.S.C. §§ 3261-3267. 71 Fed.

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Reg. 8946 (Feb. 22, 2006). *See also* Department of Defense Instruction 5525.11, available at [www.dtic.mil/whs/directives/corres/html/552511.htm](http://www.dtic.mil/whs/directives/corres/html/552511.htm). MEJA establishes federal criminal jurisdiction over persons “employed by or accompanying the Armed Forces outside the United States” (as well as members of the armed forces in certain circumstances) when they engage in “conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States [18 U.S.C. § 7].” The statute (and regulations) further define the scope of jurisdiction to exclude persons who are “national[s] of or ordinarily resident in the host nation” and are “present or residing outside the United States in connection with such employment.” The rule was published, as required by § 3266 of the statute, by the Secretary of Defense in consultation with the Attorney General and the Secretary of State to implement the statute. *See Digest 2004* at 168-70.

Section 153.2 of the new rule, “Applicability and scope”, explains the gap filled by MEJA and the rule as follows:

While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within “the special maritime and territorial jurisdiction of the United States” or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation’s borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by military personnel, former service members, and civilians employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U.S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the Uniform Code of Military Justice (UCMJ), unless Congress had declared a “time of war” when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which

they occurred. See section 2 of Report Accompanying the Act (Report to Accompany H.R. 3380, House of Representatives Report 106-778, July 20, 2000 hereafter referred to as “the Report Accompanying the Act”). While the U.S. could impose administrative discipline for such actions, the Act and this part are intended to address the jurisdictional gap with respect to criminal sanctions.

Section 153.2. also provides that “[n]othing in this part may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal. . . .”

Annex A to the regulation, “Guidelines” is set forth below and included in the Federal Register.

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(a) Civilians employed by the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(b) Civilians accompanying the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(c) Former members of the Armed Forces who commit felony offenses while serving as a member of the Armed Forces outside the U.S., but who ceased to be subject to UCMJ court-martial jurisdiction without having been tried by court-martial for such offenses, are subject to U.S. criminal jurisdiction under the Act and shall be held accountable for their actions, as appropriate.

(d) The procedures of this part and DoD actions to implement the Act shall comply with applicable Status of Forces Agreements, and other international agreements affecting relationships and activities between the respective host nation countries and the U.S. Armed Forces. These procedures may be employed outside the United States only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the applica-

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tion of these procedures. Such awareness may come in various forms, including but not limited to Status of Forces Agreements containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

(e) Consistent with the long-standing policy of maximizing U.S. jurisdiction over its citizens, the Act and this part provide a mechanism for furthering this objective by closing a jurisdictional gap in U.S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the United States. In so doing, the Act and this part provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U.S. law also violate the law of the host nation, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

(f) In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and these procedures should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the United States, initiation of action under this part would not generally be warranted unless serious misconduct were involved.

(g) The procedures set out in the Act and this part do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

### C. INTERNATIONAL CRIMINAL TRIBUNALS AND RELATED ISSUES

#### 1. Ad Hoc Criminal Tribunals and Related Issues

On November 8, 2005, Department of State Legal Adviser John B. Bellinger, III, participated in an ABA International Rule of Law Symposium Panel, "The Importance of the Rule of Law in Preventing Conflict and Rebuilding Societies."

In his remarks he addressed the role of the UN ad hoc criminal tribunals for Yugoslavia and Rwanda as well as other international tribunals and domestic courts. The full text of Mr. Bellinger's remarks, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

. . . [T]he United States is firmly committed to accountability. We believe that people who commit genocide, crimes against humanity or war crimes must be held accountable.

Holding individuals accountable provides:

- Deterrence effect: end impunity for such grievous crimes.
- A measure of justice for victims.
- An unvarnished historical record, preventing criminals from masquerading as national heroes.
- Ability to establish individual responsibility, as opposed to collective responsibility, so that groups can achieve reconciliation.

There is no single means of pursuing accountability. Rather, there is a spectrum of options: domestic prosecutions, international tribunals, hybrid tribunals (including those featuring a mix of local and international judges), and other mechanisms, such as truth and reconciliation commissions.

As a starting point, the USG believes that *domestic prosecutions*, where feasible, are the best option. Ideally, criminal defendants should be tried by their own people under their own laws. But homegrown justice is not always possible.

Some of the factors to examine in identifying the best option for a particular situation include:

- The desires of the affected societies.
- Political will.
- General environment for fair trials.
- Capacity—including existence of trained and professional judges and prosecutors and provisions for legal representation for defendants; protections for victims and witnesses; financial and other resources for conducting investigations and trials.

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- Access to evidence and ability to bring defendants into custody.
- Commitment and support of the international community.

Let me give you some concrete examples of particular types of tribunals and USG engagement and support.

### Ad Hoc Tribunals: ICTY and ICTR

In the cases of the former Yugoslavia and Rwanda, we recognized the impossibility of bringing key perpetrators to justice in domestic courts. In both cases, conditions on the ground—including lack of political will and capacity as well as concerns about fair trials in ethnically inflamed environments—made an international ad hoc tribunal an appropriate response. Indeed, with Yugoslavia, the tribunal was established while the conflict was still raging.

The ICTY and ICTR were ground-breaking, established under Chapter VII of the UN Charter. Incidentally, I am proud to say that State Department lawyers helped draft the relevant UN Security Council Resolutions that established these tribunals.

Since their inception, the USG has remained committed to these two tribunals. . . .

But these tribunals were never intended to be permanent. Once the major perpetrators are tried by the ICTY and ICTR, and conditions in the affected countries improve and stabilize, the locus of war crimes prosecutions will—as it should—shift back to the domestic arena. This calls for a focus on *domestic capacity building*. In the Balkans context, for example, the USG was the single largest contributor to creation of the Sarajevo War Crimes Chamber, providing \$10 million last year. The Chamber—which has a mix of local and foreign prosecutors, with the foreign staff scheduled to be phased out over time—opened its doors this year. We have also provided significant funding for the Belgrade War Crimes Chamber, as well as support to Croatian courts. We fund training for regional judges and prosecutors in the region, and have an active DOJ Resident Legal Adviser program to provide technical assistance and advice.

### Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) is, unlike the ICTY and ICTR, not a UNSC subsidiary organ. It was established by an

agreement between Sierra Leone and UN pursuant to Chapter VI, not Chapter VII, of the UN Charter. Only one state—Sierra Leone—has assumed legal obligations regarding the Special Court. It is thus a hybrid, rather than a purely international tribunal. The court has a simplified structure, is less cumbersome and less expensive than the ad hoc tribunals, and operates on a smaller scale: the SCSL has issued 13 indictments (the ICTY has issued approximately 160, the ICTR over 90). The USG has supported the search for accountability in Sierra Leone, voluntarily contributing \$22M to the Special Court as well as contributing to Sierra Leone's Truth and Reconciliation Commission.

Iraqi High Tribunal (formerly known as Iraqi Special Tribunal)

Yet another type of tribunal is that recently created in Iraq. In the case of Iraq, there was the political will to prosecute senior-level former regime officials for war crimes, crimes against humanity, genocide, and certain offenses under Iraqi law, and much of the capacity needed to do so domestically. However, there was a need for assistance in certain areas, particularly in the area of security. The Iraqi Governing Council thus chose to create a domestic court with international support. The Iraq Special Tribunal is a two-tiered court [there's only a trial chamber and an appellate chamber] that operates in accordance with Iraqi law; its statute and rules of procedure draw upon the experience of the ICTY, ICTR, and SCSL. International support has included technical assistance, including training for the judges in international criminal law and procedure. The USG has provided funding and has established the Regime Crimes Liaison Office (RCLO) to support Iraqi-led investigations and prosecutions. The first IST trial, of Saddam Hussein and 7 other defendants, began October 19.

ICC

But we do not support every type of tribunal. Take the ICC, which is a treaty-based tribunal. While the United States shares common goals with many ICC supporters, we disagree with the ICC's method for achieving accountability. From the U.S. perspective, the ICC lacks an adequate system of checks and balances: the Rome Statute gives the ICC prosecutor the ability to initiate cases without appropriate oversight by the UN Security Council. This

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creates a risk of politicized prosecutions, and infringes on the Security Council's primary role under the UN Charter for the maintenance of international peace and security. In addition, as a matter of principle, we object to the ICC's claim of jurisdiction over persons from states who have not become parties to the Rome Statute.

While the United States continues to maintain fundamental objections to the ICC, we share with ICC supporters the commitment to bringing to justice perpetrators of genocide, war crimes, and crimes against humanity, and we believe that our differences over the ICC should not prevent us from finding ways to work together on this important issue. We did not veto UN Security Council Resolution 1593, which referred the situation in Darfur to the ICC, because we recognized the need for the international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes. Moreover, we have re-emphasized that we respect the right of other countries to become party to and support the ICC, but we expect ICC parties to respect our right not to become a party and not to be covered by the Rome Statute.

\* \* \* \*

On December 15, 2005, Carolyn Willson, Minister Counselor for Legal Affairs, U.S. Mission to the United Nations, delivered statements in the Security Council on both the UN International Criminal Tribunal for the former Yugoslavia ("ICTY") and the UN International Criminal Tribunal for Rwanda ("ICTR"). *See* statement on the ICTY, available at [www.usunnewyork.usmission.gov/05\\_253.htm](http://www.usunnewyork.usmission.gov/05_253.htm) and on the ICTR at [www.usunnewyork.usmission.gov/05\\_254.htm](http://www.usunnewyork.usmission.gov/05_254.htm).

Ms. Willson reiterated U.S. support for both ad hoc tribunals. As to the obligations of states to "fulfill their legal obligations to cooperate fully with the ICTY," Ms. Willson's ICTY statement welcomed Croatia's arrest and transfer of ICTY indictee Ante Gotovina to the Tribunal. Ms. Willson stated further:

The United States also calls on the Government of Serbia-Montenegro and the Bosnian Serb authorities to fulfill their obligations to the ICTY, in particular through the



apprehension and transfer to the Tribunal of Radovan Karadzic and Ratko Mladic, for whom the Tribunal's doors will always remain open. The United States and others in the international community have made clear that upholding international obligations to the ICTY is a prerequisite for further integration into the Euro-Atlantic community. As long as Karadzic and Mladic remain at large, Serbia and Montenegro and Bosnia and Herzegovina will not be able to engage fully with Euro-Atlantic institutions.

Ms. Willson stressed the importance of "work[ing] together to ensure the success" of the UN Security Council-endorsed completion strategy which for both tribunals "seeks to conclude trials by 2008, and all work by 2010" and for the international community to help the completion strategy succeed by providing "strong support for the [tribunals'] efforts to help create the capacity for credible domestic trials of low and mid-level war crimes cases."

In her ICTR statement, Ms. Willson also called on all states, "especially the Democratic Republic of the Congo, the Republic of the Congo, and Kenya to fulfill their international obligations to apprehend and transfer Felicien Kabuga and all other persons indicted for war crimes by the ICTR, who are within their territory, to the Tribunal."

## **2. International Criminal Court**

### ***a. United Nations resolutions***

#### ***(1) Security Council referral of Darfur***

On March 31, 2005, the UN Security Council adopted Resolution 1593, referring the war crimes in Darfur to the International Criminal Court. The United States abstained from, but did not veto, the resolution. Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, provided an explanation of the U.S. action in a statement of the same date.

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The full text of Ambassador Patterson's statement, excerpted below, is available at [www.usunnewyork.usmission.gov/o5\\_o55.htm](http://www.usunnewyork.usmission.gov/o5_o55.htm).

\* \* \* \*

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. In September we concluded that genocide had occurred in Darfur, and we called for and supported the creation of the International Commission of Inquiry. UN estimates are that 180,000 people have died from violence, atrocities, and the hunger and disease caused by the conflict. Justice must be served in Darfur.

By adopting this resolution (1593), the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution.

While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speaks with one voice in order to help promote effective accountability. The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute. This strikes at the essence of the nature of sovereignty. Because of our concerns, we do not agree to a UNSC referral of the situation in Darfur to the ICC and have abstained on this resolution. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in Sudan, and because the resolution provides protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-state parties.

The United States is and will be an important contributor to the peacekeeping and related humanitarian efforts in Sudan. The language providing protection for the US and other contributing states is precedent-setting, as it clearly acknowledges the concerns of

states not party to the Rome Statute and recognizes that persons from these states should not be vulnerable to investigation or prosecution by the ICC, absent consent by these states or a referral by the Security Council. In the future, we believe that, absent consent of the state involved, any investigations or prosecutions of nationals of non-Party states should come ONLY pursuant to a decision by the Security Council.

Consistent with our longstanding views about the appropriate role of the Security Council, we expect that—by having the Security Council refer the situation in Darfur to the ICC—firm political oversight of the process will be exercised. The Council’s action today plays an important role in this regard; we expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed.

Protection from the jurisdiction of the Court should not be viewed as unusual. Indeed, under Article 124, even parties to the Rome Statute can “opt out” from the Court’s jurisdiction over war crimes for a period of seven full years, and important supporters of the Court have in fact availed themselves of this opportunity to protect their own personnel. If it is appropriate to afford such protection from the jurisdiction of the Court to states that have agreed to the Rome Statute, it cannot be inappropriate to afford protection to those that have never agreed. It is our view that non-Party states should be able to “opt out” of the Court’s jurisdiction, as parties to the Statute can, and the Council should be prepared to take action to this effect as appropriate situations arise in the future.

Although we abstained on this Security Council referral to the ICC, we have not dropped, and indeed continue to maintain, our longstanding and firm objections and concerns regarding the ICC. We believe the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute’s assertions that the ICC has jurisdiction over the nationals, including government officials, of states that have not become a party to the Rome Statute.

Non-parties have no obligations in connection with this treaty, unless otherwise decided by the Security Council, upon which

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members of this organization have conferred primary responsibility for the maintenance of international peace and security.

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations, and that instead such costs shall be borne by the parties to the Rome Statute and those that contribute voluntarily. This principle is extremely important and we want to be perfectly clear that any effort to retrench on this principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response. This is a situation that we must avoid.

As is well known, in connection with our concerns about the jurisdiction of the Court and the potential for politicized prosecutions, we have concluded agreements with 99 countries—over half the member states of this Organization—since the entry into force of the Rome Statute to protect against the possibility of transfer or surrender of United States persons to the Court.

We appreciate that the resolution takes note of the existence of these agreements, and will continue to pursue additional such agreements with other countries as we move forward. Recognizing that non-parties have no obligation under the Rome Statute, the resolution recognizes and accepts that the ability of some states to cooperate with the ICC investigation will be restricted in connection with applicable domestic law. For the United States, we are restricted by U.S. statute that reflects deep concerns about the Court from providing assistance and support to the ICC.

In the Darfur case the Council included, at our request, a provision that exempts persons of non-party states in Sudan from ICC prosecution. We respect the position of those countries that are parties to the Rome Statute of the International Criminal Court. But persons from countries not party who are supporting the UN's or AU's efforts should not be placed in jeopardy. This resolution provides clear protection for U.S. persons. No U.S. person supporting the operations in Sudan will be subject to investigation or prosecution because of this resolution.

This does not mean that there will be immunity for American citizens that act in violation of the law. We will continue to discipline our own people when appropriate.

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*(2) Resolutions in other UN bodies*

On November 23, 2005, Carolyn Willson, Counselor for International Legal Affairs, addressed the General Assembly to explain the U.S. decision to disassociate from consensus on General Assembly Resolution 29, "Report of the International Criminal Court, U.N. Doc. A/RES/60/29 (2005). Among other things, the resolution "[c]alls upon all States from all regions of the world that are not yet parties to the Rome Statute of the International Criminal Court to consider ratifying or acceding to it without delay . . . ." Ms. Willson's remarks, excerpted below, are available in full at [www.un.int/usa/05\\_229.htm](http://www.un.int/usa/05_229.htm).

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Our concerns about the Rome Statute and the International Criminal Court are well known. They include the ICC's assertion of jurisdiction over nationals of states not parties to the Rome Statute, including U.S. nationals, and the lack of adequate oversight of the ICC's activities, including those of the Prosecutor who may initiate cases without first seeking approval of the Security Council. As in past years, these concerns require the United States to dissociate itself from consensus on this resolution.

While our concerns about the ICC have not changed, we would like to move beyond divisiveness on this issue. We share the commitment of parties to the Rome Statute to bring to justice those who perpetrate genocide, war crimes, and crimes against humanity. While we have honest differences of view on how accountability is best achieved, we must work together to ensure that perpetrators of these atrocities are held accountable for their actions. The actions of the United States demonstrate clearly that we have been and continue to be among the most forceful advocates for the principle of accountability for war crimes, genocide and crimes against humanity.

We demonstrated our willingness to working constructively on these matters in connection with Darfur, where it was the United States that concluded that genocide had occurred, and the United

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States that called for and supported the creation of the International Commission of Inquiry. And while we would have preferred an alternative mechanism, we believed it was sufficiently important for the international community to speak with one voice and to act decisively that we accepted referral of the Darfur situation by the Security Council to the ICC. These events demonstrate that there can be common ground when both sides are willing to work constructively.

I'd like to emphasize today what we've said in the past: We respect the right of other states to become parties to the Rome Statute; we ask in return, however, that other states respect our decision not to do so. With respect to this resolution, we made good faith efforts to work with supporters of the ICC on language that would reflect this simple principle, and were deeply disappointed that our efforts to turn a new page were rejected. As we move forward, we urge ICC supporters to reciprocate our efforts to seek common ground and avoid divisiveness. In our view, this begins with an acknowledgment that there are honest differences of views on these issues, and an acknowledgment of the right of the United States and other states to decide not to become parties to the ICC and not to subject their citizens and officials to its jurisdiction. This should not be too much to ask.

We have noted in the past the importance we attach to the principle, adopted by the General Assembly in resolution 58/318, that the costs of any assistance or services provided by the UN to the ICC must be fully reimbursed to the UN. We are pleased that the sponsors of this resolution were willing to make this clear in the resolution.

Efforts to include language in resolutions of the General Assembly or Security Council that are inconsistent with a basic respect for the honest differences of views about the ICC serve only to exacerbate divisions and make it more difficult for the international community to pursue common approaches in the fight against impunity. Not every issue needs to be turned into a debate about the role of the ICC. It is our hope that, going forward, efforts by all parties to work constructively and in good faith will allow us to spend less time arguing over the ICC and more time working together to ensure accountability for serious crimes.

The United States also commented on language related to the ICC in resolutions in the UN Human Rights Commission. As discussed in Chapter 6.F.2., the United States joined consensus on Resolution 2005/62, "Prevention and Punishment of Genocide." The U.S. statement indicated continuing concerns with references to the ICC in the resolution, however, as excerpted below. The full text of the U.S. statement is available at [www.humanrights-usa.net/2005/0420Item17EOP.htm](http://www.humanrights-usa.net/2005/0420Item17EOP.htm).

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... [M]y delegation has remaining concerns about operative paragraph 5 of the resolution, which refers to the Five Point Plan of the Secretary-General to prevent genocide. While we appreciate the efforts of the Secretary-General to explore options for the prevention of genocide and are able to support the majority of the Secretary-General's plan, we do not agree with Point Three of the Plan, which refers to the International Criminal Court and encourages "greater efforts to achieve wide ratification of the Rome Statue."

Mr. Chairman, the position of the United States on the subject of the International Criminal Court is well known. The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute. Absent the consent of the parties involved, any investigations or prosecutions of nationals of non-party states should come only pursuant to a decision by the UN Security Council. The U.S. believes that the Rome Statue is flawed and does not have sufficient protections from the possibility of politicized prosecutions. Further, we underline that non-parties have no obligations in connection with this treaty, unless otherwise decided by the Security Council, upon which members of this organization have conferred primary responsibility for the maintenance of international peace and security.

Specific ad hoc international criminal tribunals, such as those created for Rwanda and the former Yugoslavia, are effective international tools for addressing impunity and beginning the process of peace and reconciliation in societies torn apart by genocide. It is

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also important to focus our efforts on increasing the capacity of domestic systems to address abuses.

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On April 21, 2005, the United States addressed similar issues in conjunction with Resolution 2005/81, "Impunity." While the United States stated that it shared "the sponsors' commitment to combating impunity," it explained its position on the ICC and related judicial process concerns as excerpted below. The full text of the statement is available at [www.humanrights-usa.net/2005/0421Item17.htm](http://www.humanrights-usa.net/2005/0421Item17.htm). Before joining consensus, the United States offered amendments to the resolution to address its concerns. The amendments were defeated. See Report on the 61st Session at 453, available at [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

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The United States position on the Rome Statute and the ICC is well known. We cannot join in positive statements about them, and we certainly oppose any effort to encourage States to sign, ratify or accede to them. We also must note that non-parties to the ICC Treaty have no legal obligations in connection with that Treaty, unless otherwise decided by the UN Security Council.

In addition to this Resolution's troubling provisions on the ICC, my delegation must note that the text fails repeatedly to recognize the very important role of national law and domestic courts in dealing with the offenses concerned and combating impunity generally. We steadfastly maintain that justice is always best achieved through functioning national judicial systems that have the independence and impartiality necessary to bring criminals to justice and protect citizens from impunity. Ignoring or turning a blind eye to that fact merely makes it harder for States who truly care about ending impunity to recruit a broad international coalition to pool resources and help countries build capacity to address human rights violations through better domestic courts.

The text of this Resolution suffers from two other flaws worth noting. First, it attempts to impose absolute requirements that are



not appropriate or possible in a common law system with an independent prosecutor with appropriate prosecutorial discretion and an independent judiciary. These, in the United States's estimation, are very important features of a successful criminal justice system that has the capacity to promote and defend human rights.

Second, the term "international crimes" as used in this Resolution is misleading and incorrect, in that the offenses in question are simply crimes that are prosecuted in domestic courts or in international courts established by treaty or UN direction.

Let me stress again the United States position on impunity. A vast array of national, state, and local laws direct law enforcement to carry out their responsibility humanely, and, when abuse occurs, the United States courts act with speed and dispatch. Our principal problem with this Resolution is the escalating enthusiasm for making euphoric prognostications about the International Criminal Court. The comments are largely superfluous, and the veiled criticism of non-state parties is unnecessary. Thus, we join consensus this year, with the expectation that Member States will respect the spirit of multilateral cooperation in the future by forging a resolution that does not, through its references to the Rome Statute, create controversy and divisiveness over an issue where none need exist.

***b. Article 98 agreements***

During 2005, the United States concluded four new "Article 98 Agreements", and extended the duration of one such agreement. Article 98 of the Rome Statute provides that the ICC may not proceed with a request for surrender (of a person to the jurisdiction of the Court) that would require a State to act inconsistently with obligations under an international agreement under which its consent is first required to so surrender such person. *See also* press statement of May 3, 2005, announcing signature of 100th Article 98 agreement, with Angola, available at [www.state.gov/r/pa/prs/ps/2005/45573.htm](http://www.state.gov/r/pa/prs/ps/2005/45573.htm).

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### *c. Provision of foreign assistance*

#### *(1) Economic Support Fund*

Section 574 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 2005, as contained in Pub. L. 108-447, 118 Stat. 2809, signed into law December 8, 2004, prohibited foreign assistance from the Economic Support Fund to a country that is “a party to the International Criminal Court and has not entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Court from proceeding against United States personnel present in such country,” absent a Presidential waiver. On February 10 and August 29, 2005, President George W. Bush waived the prohibition on use of such funds for Jordan as “important to the national security interests of the United States,” each time for a period of six months. 70 Fed. Reg. 8497 (Feb. 18, 2005) and 70 Fed. Reg. 55,011 (Sept. 19, 2005).

#### *(2) Military assistance*

During 2005 President Bush waived for three countries application of the prohibition on military assistance to the government of a country that is a party to the Rome Statute, with certain exceptions, pursuant to § 2007 of the American Servicemembers’ Protection Act of 2002, 22 U.S.C. § 7421 *et seq.* (see *Digest 2003* at 237-40). During 2005, President Bush determined that the Dominican Republic, Cambodia, and Benin had each entered into “an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against U.S. personnel present in such countries,” and waived the prohibition in § 2007(a) “for as long as such agreement remains in force.” 70 Fed. Reg. 40,181 (July 12, 2005 (Dominican Republic)); 70 Fed. Reg. 46,395 (Aug. 9, 2005 (Cambodia)); and 70 Fed. Reg. 55,015 (Sept. 19, 2005 (Benin)).

**Cross References**

*Role of consular notification in criminal proceedings*, Chapter 2.A.1.

*Prosecution under federal wire fraud statute*, Chapter 5.A.2.

*Treatment of allegations of torture in extradition proceedings*,  
Chapter 6.E.1.

*Human rights and terrorism*, Chapter 6.J.

*Anti-terrorism exception to FSIA*, Chapter 10.4.b.

*Internet security, World Summit on the Information Society*, Chap-  
ter 11.F.1.

*UN terrorism sanctions*, Chapter 16.7.



## CHAPTER 4

### Treaty Affairs

#### A. CAPACITY TO MAKE

##### 1. Unilateral Acts of States

On November 18, 2005, Carolyn Willson, Minister Counselor for Legal Affairs, U.S. Mission to the United Nations, addressed the Sixth Committee on Agenda Item 80, Report of the International Law Commission on the Work of its 57th Session—Unilateral Acts of States.

The full text of Ms. Willson's statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Report of the International Law Commission is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm). The Report of the Sixth Committee for this session is found in U.N. Doc. A/C.6/60/SR.15, which includes the substance of the U.S. statement at 2, available at <http://documents.un.org>.

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The United States recognizes the particular challenges raised by this topic. Disagreements among members of the Commission after eight years of study on such fundamental issues as what might qualify as unilateral acts of states and how such acts should be classified and analyzed have slowed down progress on this topic. The Special Rapporteur's Eighth Report serves to further demonstrate those continuing disagreements and, some might argue, raises doubts about the usefulness of further study of this topic.

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For our part, we urge other States to consider carefully whether opportunities exist to consider bringing this project to conclusion in the near future. We very much appreciate the remarks, reflected in the most recent ILC report, about the importance of the part played by the addressees to whom unilateral statements are addressed, their reactions, and the reactions of third parties. The importance of such factors underscores that this is an area in which the specific context in which a unilateral act takes place—as opposed to the act itself—plays such a central role that it is hard to see this being an area that is amenable to codification of progressive development. Similarly, the importance, which is highlighted in the report, of intent—on whether a state manifestly intends to undertake a legal commitment, as opposed to making statements not showing such a clear intent, or engaging in other forms of “unilateral conduct”—remains critical, and this again highlights our view, which the Commission’s report indicates was reflected in the discussions with the Commission, that codification and progressive development are neither appropriate nor feasible.

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### 2. Great Lakes Water Management Initiative

On December 13, 2005, the governors of eight U.S. states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) and the premiers of two Canadian provinces (Ontario and Québec) signed the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (“Agreement”) and the Great Lakes-St. Lawrence River Basin Water Resources Compact (“Compact”). A press release of that date stated that together the agreements, signed at the Council of Great Lakes Governors’ (“CGLG”) Leadership Summit in Milwaukee, Wisconsin, would “provide unprecedented protections for the Great Lakes-St. Lawrence River Basin.”

A separate fact sheet, "Annex 2001 Implementing Agreements," explained the federalism aspects of the agreements as follows:

The Governors and Premiers are working aggressively to put these agreements into action. In the United States, each of the eight State legislatures must ratify the inter-state Compact. Congress will also be asked for its consent. After this, the Compact will become both State and federal law. In order to put the agreement into law in Ontario and Québec, the Provinces will amend their statutes and regulations as appropriate. No federal legislation is required in Canada.

Article 700 of the Agreement, "Reaffirmation of Constitutional Powers and Responsibilities," provides as follows:

1. Nothing in this Agreement alters the legislative or other authority of Parliament or of the Provincial legislatures or of the federal Government of Canada or of the Provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.

2. This Agreement is not intended to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States of America.

The Department of State was not consulted on the final text of the Agreement or Compact prior to their signature. Both instruments appear to contain language of a legally binding nature. In the absence of Congressional approval, they may therefore raise questions under the Compact Clause of the Constitution, which provides that "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." U.S. Const., art. I, § 10, cl. 3. The text of the two agreements and related documents are available at [www.cglg.org](http://www.cglg.org).

### 3. European Community

The legal status of the European Community in negotiations and as a party to treaties continued to be addressed in international fora during 2005. Three instances are discussed here; *see also* Convention Strengthening the Inter-American Tuna Commission, Chapter 13.A.2.c.(2).

#### a. *Negotiation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*

As discussed in Chapter 14.C.1, on October 20, 2005, the thirty-third General Conference of the UN Educational, Scientific, and Cultural Organization ("UNESCO") adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. In anticipation of negotiations on the draft convention at the inter-governmental meeting of experts and at the final negotiating session during the General Conference, the European Community ("EC") had sought enhanced participation rights in those negotiations. The EC cited the transfer from EU member states to the EC of competency in relevant areas including trade, free movement of people, and intellectual property rights. Following negotiations on this issue between the EC and the United States and several other member states, a consensus decision was presented to the UNESCO Executive Board at its 171st session in Paris on May 12, 2005, and adopted on the same date. In the agreed text, the Executive Board:

[i]nvite[d], on an exceptional basis, the European Community, while maintaining its observer status, to participate actively and as fully as appropriate in the work of the inter-governmental meeting of experts [on the cultural diversity preliminary draft convention]; and

[r]ecommend[ed] that the General Conference, at its 33rd session, take this decision into account with respect to its consideration of the item related to the preliminary draft convention on the protection of the diversity of cultural contents and artistic expressions.



See UNESCO Executive Board Document 171 EX/Decisions (May 25, 2005) at 71-72, available at <http://unesdoc.unesco.org/images/0013/001395/139515E.pdf>.

Following adoption of the resolution, several member states made statements concerning the language as adopted. The U.S. Ambassador stated that “the statement read by the Ambassador from the United Kingdom really was very clear as to exactly how this is going to work.” Excerpts follow from the UK statement. The full texts of the statements are available at [www.state.gov/sl/c8183.htm](http://www.state.gov/sl/c8183.htm).

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#### United Kingdom

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The decision just adopted refers to active participation of the European Community as fully as appropriate. The European Union considers that this active participation shall consist within the negotiation of the convention of the ability to speak as other participants. Such active participation shall also consist of the ability to reply, to put forward proposals and amendments on issues for which it has competence at the formal meetings. It shall also include the ability to take part in the discussion of procedural issues within the context of the draft cultural diversity convention and the ability to take part in the committees, working groups, formal or informal meetings set up in the course of the work relating to negotiation of this convention.

The European Community shall have its own nameplate. The European Community may not chair committees or sub-committees or serve as Rapporteur unless there is full consensus. The European Community shall not have the right to vote nor break or block consensus. Furthermore, European Community participation does not mean an additional voice. Indeed, the European Community decides in internal coordination whether the Presidency of the Council will speak on an issue on behalf of the Member States or whether the Commission will speak in matters of its competence on behalf of the Community and its Member States.

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During this process we have been open to providing further explanations concerning competences of the Community as regards the draft convention whenever it speaks. We will continue to do so.

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### ***b. Hague Conference on Private International Law***

The Hague Conference on Private International Law (“HCCH”) is an intergovernmental organization in The Hague concerned with the development and harmonization of private international law. HCCH negotiates and adopts international conventions in the areas of international judicial cooperation, family law, and commercial law, and provides a forum for coordination on issues related to implementation of those treaties. The Statute of the HCCH is a congressional-executive agreement for the United States. Pursuant to Public Law 88-244, a Joint Resolution signed December 30, 1963, the United States became a member of the organization on October 15, 1964.

The European Community sought membership in the HCCH because competence over many areas of international judicial cooperation has shifted from the member states to the Community, and the member states no longer have the ability to negotiate on these matters. On June 30, 2005, delegates signed the Final Act of the Twentieth Session of the Hague Conference on Private International Law, adopting amendments to the Statute of the HCCH to submit to member states for their approval. The United States supported the adoption of the amendments, which would make it possible for the European Community to join the Hague Conference and negotiate on behalf of its member states in areas in which it has competence. The amendments would also “make certain adaptations to the text of the Statute so that it conforms with practices which have developed since the Statute came into force on 15 July 1955, and to establish an English version of the Statute equally authentic to the French.”

The amendments were negotiated on the basis of a draft developed by the Secretary-General after consultations with an informal advisory group composed of a number of govern-

ment representatives, including the United States. The final language reflects the U.S. view, among other things, that it is important to allow the European Community to join the Hague Conference, so long as its participation is guided by the principle of non-additionality. Paragraph 7 of the new Article 3 (set forth below) reflects this concern, stating in relevant part that a Member Organization shall exercise its “rights on an alternative basis with its Member States that are Members of the Conference, in the areas of their respective competences.” The discussion in the diplomatic session confirmed that any member organization’s participation would be conducted consistent with the principle of “non-additionality.” Paragraphs 3, 4 and 6 of the new Article 3 complement this principle by providing that a Member Organization and its Member States must provide information that specifies the matters in respect of which competence has been transferred to the Member Organization from the Member States. The United States also supported the preservation of the term “Regional Economic Integration Organization” as a term of art used in other instruments to refer to the European Community that reflects a type of organization with strong competence in certain areas.

Under Article 12, entry into force of the amendments requires approval by two-thirds of the HCCH member states; that had not yet occurred at the end of 2005 although the United States is among those who have already submitted their approval. At such time as the amendments enter into force, there are still two events that must take place before the European Community would be considered a member of the Hague Conference. First, in accordance with Paragraph 1 of the new Article 3, a majority of Member States of the Conference present at a general affairs and policy meeting must vote to admit the European Community. Second, the European Community must accept the Hague Statute.

The Final Act is available at [www.hcch.net/upload/finalact20e.pdf](http://www.hcch.net/upload/finalact20e.pdf); the amended Statute is available at [www.hcch.net/upload/text01e\\_new.pdf](http://www.hcch.net/upload/text01e_new.pdf). The text of what will be the new Article 3 follows.

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1. The Member States of the Conference may, at a meeting concerning general affairs and policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned.

2. To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.

3. Each Regional Economic Integration Organisation applying for membership shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.

4. Each Member Organisation and its Member States shall ensure that any change regarding the competence of the Member Organisation or in its membership shall be notified to the Secretary General, who shall circulate such information to the other Members of the Conference.

5. Member States of the Member Organisation shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified.

6. Any Member of the Conference may request the Member Organisation and its Member States to provide information as to whether the Member Organisation has competence in respect of any specific question which is before the Conference. The Member Organisation and its Member States shall ensure that this information is provided on such request.

7. The Member Organisation shall exercise membership rights on an alternative basis with its Member States that are Members of the Conference, in the areas of their respective competences.

8. The Member Organisation may exercise on matters within its competence, in any meetings of the Conference in which it is entitled to participate, a number of votes equal to the number of its Member States which have transferred competence to the Member Organisation in respect of the matter in question, and which are entitled to vote in and have registered for such meetings. Whenever the Member Organisation exercises its right to vote, its Member States shall not exercise theirs, and conversely.

9. “Regional Economic Integration Organisation” means an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.

Among amendments on other issues supported by the United States, a new paragraph 2 concerning consensus was added to what will be Article 8 of the Statute of the HCCH. As amended, that article will read:

1. The Sessions and, in the interval between Sessions, the Council may set up Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.
2. The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.

The Final Act adopted June 30 also contained the text of the Choice of Court Convention, discussed in Chapter 15.A.1. The text provided for a REIO to become a party to the Choice of Court Convention under circumstances where it “has competence over some or all of the matters governed” by the convention (Art. 29) or where it declares “it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties but shall be bound by virtue

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of the signature, acceptance, approval or accession of the Organisation.” (Art. 30).

### *c. UNCITRAL electronic commerce convention*

Article 17 of the Convention on the Use of Electronic Communications in International Contracts, discussed in Chapter 15.A.4., also permits a REIO such as the EC to become a party to the convention, along with its member states. *See* text of the convention and related documents at [www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf](http://www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf). In addition to the language adopted, the European Community proposed that a special provision be added that would, by virtue of the treaty’s provisions, obligate states members of a REIO to adhere to the REIO’s internal law and regulations. In the case of the EC, for instance, this would require adherence to EC directives and regulations. The United States and a number of other states, including most of the EU member states represented at the plenary session, objected on the ground that it was unacceptable to use a UN private law treaty instrument as a vehicle to regulate internal matters of any non-UN body. The United States and others pointed out that since the Council of the European Union could in any event condition its approval for EU member states to adopt the convention upon their making pre-negotiated declarations, or a commitment to apply EC Directives, the special provision sought by the EC was unnecessary. No state supported the EC proposal, and it was defeated.

Alternative language supported by the EU states and the United States was adopted as paragraph 4 of article 17, which provides that the convention “shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in States members of any such organization, as set out by declaration made in accordance with Article 21.” This language, worded in terms of priority in a case of conflicts, avoids the unacceptable reliance on a UN convention to attempt to mandate adherence to common internal law.

## **B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS, APPLICATION, AND TERMINATION**

### **1. U.S. Practice Generally**

On November 1, 2005, Department of State Legal Adviser John B. Bellinger, III, addressed the Atlantic Council Workshop, "Transatlantic Approaches to the International Legal Regime in an Age of Globalization and Terrorism." Among other things, Mr. Bellinger responded to European criticism characterizing the United States as acting "lawlessly" in taking certain treaty-related actions, as excerpted below. The full text of Mr. Bellinger's remarks is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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We hear increasingly that there is a divide between the United States and Europe over our approaches to international law. The standard line in Europe seems to be that Europeans are committed to international law and international institutions, while the United States increasingly is not. Indeed, over the last four years, the United States has been criticized by some in Europe for acting "lawlessly." The United States refused to ratify the Kyoto Protocol. We unsigned the Rome Statute. We withdrew from the ABM Treaty. We went to war in Iraq without a legal basis under international law. And we have violated the Geneva Conventions by holding terrorists in Guantánamo without giving them lawyers or charging them with crimes.

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What I would like to do tonight is examine whether there actually is a deep divide between the United States and Europe on questions of international law. If so, how significant is this divide, what are the reasons for it, and what should be done about it? In reflecting on these questions, I am mindful of Secretary Rice's observation in Paris earlier this year that "it is time to turn away from the disagreements of the past." My objective, instead, is to try to address concerns that we are likely to suffer future disagreements, concerns that I think are largely misplaced.

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When one looks closely at the criticisms of U.S. policy, many seem to recast transatlantic policy differences as disputes about international law. There are several recurring categories of mistakes, two of which are closely related. First, the United States is often criticized for having failed to sign or ratify a treaty. The Kyoto Protocol is a good example. The United States did not think the Protocol was sound public policy and thought it would harm the U.S. economy, so it did not ratify the Protocol. This decision was perfectly legal under international law.

A second, related criticism attacks decisions by the United States to withdraw from international agreements. U.S. conduct with regard to the Rome Statute, which was initially subject to criticism on the ground that the United States was failing to ratify, became the subject of still more vigorous criticism when this Administration “unsigned” the agreement—that is, when it notified the UN, as depository of the Rome Statute, that we do not intend to become a party. As U.S. officials explained, this was a lawful solution to a political disagreement. While the United States is fully committed to the principle of accountability, it disagrees with the ICC’s method for achieving accountability; moreover, from the U.S. perspective, the ICC claims an objectionable form of jurisdiction over non-party states and infringes on the Security Council’s primary role under the UN Charter for the maintenance of international peace and security. A second example is the ABM Treaty between the United States and the Soviet Union. In 2002, President Bush, in accordance with Article XV of the Treaty, formally notified the United States’ withdrawal. The Administration was accused by some observers of disregarding international law. Exactly the opposite is true: The United States reviewed the ABM Treaty, determined that the Treaty had become outdated, negotiated a new arrangement with Russia, and withdrew in accordance with the express terms of the Treaty.

Similarly, in March of this year, after the International Court of Justice had issued rulings in the *LaGrand* and *Avena* cases that involved detailed review of U.S. criminal law proceedings, the United States announced that it would withdraw from the Optional Protocol to the Vienna Convention on Consular Relations, which is clearly permissible under international law. Moreover, we with-



drew only after the President had determined that the United States would comply with the ICJ's ruling in the *Avena* case.

Conflating these two types of conduct—the failure to subscribe to international agreements, and the decision to withdraw from international agreements—with a disregard for international law, as critics often do, is confused. No one doubts that states enjoy the capacity to decide for themselves which international agreements are in their national interest, and failing to endorse certain agreements due to national interests has no bearing on a state's reputation for abiding by international law.

A state's decision to refrain from becoming a party to a treaty does not mean it has abandoned multilateralism. The United States has initiated numerous climate partnerships in the last several years, establishing joint projects on climate change science, cleaner energy technologies and greenhouse gas emissions. Failing to ratify the Kyoto Protocol does not mean that the United States opposes multilateral efforts at addressing climate issues, any more than the failure of other states to agree to U.S. climate initiatives means that those states are isolationist. Similarly, the decision to unsign the Rome Statute does not indicate a distrust of international mechanisms generally or even international criminal tribunals specifically. The United States has, in fact, played a key role in setting up, funding, and supporting international criminal tribunals to bring perpetrators of serious crimes to justice in the former Yugoslavia, Rwanda and Sierra Leone.

Criticisms of U.S. decisions to withdraw from international agreements are similarly misplaced, and equally counterproductive. Both with regard to the Rome Statute and the ABM treaty, U.S. behavior was designed to remove any doubts regarding its legal commitments, and it observed carefully the international legal rules for notification. It simply cannot be preferable for the United States to retain a more ambiguous posture, even at the risk of behaving in a way inconsistent with its obligations. And to state the obvious, criticizing as lawless a state's decision to unsign or withdraw from an international agreement creates a substantial disincentive to sign, or become a party to, a treaty in the first place. The United States prefers the customary international law norms reflected in the Vienna Convention on the Law of Treaties, which rec-

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ognize that permitting withdrawal serves both sovereignty interests and the integrity of treaties.

A third type of criticism—disagreements with U.S. interpretations of international instruments—is somewhat different, though here, too, critics are too quick to regard reasonable differences of opinion as evidence of a disregard for international law. This is not a question of differing commitments to international law, or even differing legal methodologies. Like our European allies, when the wording of a treaty is unclear or when it is not obvious how a treaty should be applied in some unforeseen circumstance, we look in good faith to ordinary meaning of the text and its object and purpose, related agreements, and past practice, among other things. Unsurprisingly, differences may arise; it is no secret that treaty language is often drafted so as to permit more than one interpretation, in the expectation that disagreements will be worked out among states and if necessary resolved through further negotiations. The point, in any event, is that interpretive disputes are to be expected, and do not connote a disregard for international law; were it otherwise, the number of good-faith disagreements the EU and the United States have had in WTO cases would have branded us both as international outlaws.

The interpretive disputes recently invoked to evidence a transatlantic divide have tended to involve the use of force and the laws of war. . . .\*

\* \* \* \*

In short, I do not mean to deny that there are transatlantic differences on international law issues; examined closely, however, they have little to do with respect for international law and institutions. Rather, the differences may be rooted more in our different approaches to supranational institutions, which stem from our respective experiences in World War II and its aftermath. European integration is unlike anything that U.S. citizens have experienced, and the positive experience with European supranational institu-

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\* Editor's note: For excerpts discussing U.S. practice in the law of war, see Chapter 18.A.1.

tions may account for the lesser skepticism that Europeans have toward international institutions.

But progressive multilateralism should not be confused with the respect for international law and institutions. Return for a moment to the disagreement between the United States and Europe over Kyoto. One of the U.S. objections was that the Kyoto regime failed to enlist China, India, and developing countries on equal terms, and that once that agreement was finalized much of the opportunity to enlist such states in legally binding commitments would be lost. Since Kyoto's entry into force, the United States and Australia have sought a different sort of multilateral solution in which China and India, together with several other states, are equal participants in a voluntary regime. Not only did the U.S. failure to ratify Kyoto not signal an abandonment of multilateralism, it proceeded on the defensible view that multilateralism may be most effective when it proceeds on more realistic assumptions about the incentives of states.

Consider another sticking point for some critics, the U.S. failure to ratify certain human rights instruments like the Convention on the Elimination of All Forms of Discrimination against Women—CEDAW. It seems misguided to concentrate criticism on the United States, or to emphasize differences in the legal posture of the United States and European states, when blatant violators of women's rights are welcomed as parties to the treaty, many with reservations that broadcast a comprehensive disagreement with the treaty's articles. International law and institutions should represent achievements in multilateralism, not provide cover for states in a way that actually impairs the multilateral promotion of human rights.

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## **2. Cooperating Non-Member**

As discussed in Chapter 13.A.2.c.(1), the United States transmitted the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, with Annexes ("the WCPF Convention") to the Senate for advice and consent to ratification on May 16, 2005. In a letter dated May 20, 2005, the United

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States advised the Western and Central Pacific Fisheries Commission ("WCPFC"), that it intended to participate in the WCPFC as a cooperating non-member until it becomes a party to the convention, stating:

. . . In accordance with paragraph 21 of the Summary Record of the First Session of the Western and Central Pacific Fisheries Commission (WCPFC/Comm.1/8),\* held December 9-10, 2004 in Pohnpei, Federated States of Micronesia, the United States hereby advises the Commission that it intends, consistent with its policies and to the extent possible under its domestic law, to follow the procedures listed in paragraph 3 of the decision relating to Cooperating Non-Members, contained in Annex II of WCPFC/PreCon/46.\*\*

\* Editor's note: Paragraph 21 provides, in relevant part, that the Commission "decided to designate [the United States, among others] as a Cooperating non-member until such time as it becomes a member of the Commission or until the end of the Commission's next regular annual session, whichever is the earlier. . . . Each of these States shall formally advise the Commission that it undertakes to comply with the obligations listed in paragraph 3 of the procedures for Cooperating non-members." See *www.wcpfc.org* under Meetings.

\*\* Editor's note: The referenced paragraph provides:

3. Cooperating non members shall:

- (a) Comply with all conservation and management measures in force in the Convention Area;
- (b) Provide all the data members of the Commission are required to submit, in accordance with the recommendations adopted by the Commission;
- (c) Inform the Commission annually of the measures it takes to ensure compliance by its vessels with the Commission's conservation and management measures;
- (d) Respond in a timely manner to alleged violations of conservation and management measures by its vessels, as requested by a member of the Commission or determined by the appropriate subsidiary bodies of the Commission and communicate to the member making the request and to the Commission, the actions it has taken against the vessels in accordance with the provisions of Article 25 of the Convention.

See WCPFC/PreCon/50, Volume I at 351-52, available at *www.wcpfc.org* under Preparatory Conference.

. . . In accordance with the U.S. Constitution, the United States may only assume legal obligations under the Convention after having received . . . advice and consent of the Senate. Until such time as the United States completes its domestic procedures for membership, we look forward to participating actively in the work of the WCPF Commission as a Cooperating Non-Member.

The full text of the letter is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

### 3. Reservations Practice

On November 18, 2005, Carolyn Willson, Minister Counselor for Legal Affairs, U.S. Mission to the United Nations, addressed the Sixth Committee on Agenda Item 80, Report of the International Law Commission on the Work of its 57th Session—Reservations to Treaties.

The full text of Ms. Willson's statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Report of the International Law Commission is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm). The Report of the Sixth Committee on the relevant session is found in U.N. Doc. A/C.6/60/SR.15, which includes the substance of the U.S. statement at 2, available at <http://documents.un.org>.

\* \* \* \*

The Commission has asked for States to comment on what the effect of an objection to a reservation is, if the objection is made on the grounds that the reservation is incompatible with the object and purpose of the treaty and if the objecting State does not oppose the entry into force of the treaty between itself and the reserving State. The report of the Commission notes that some States take the position that if a State has made a prohibited reservation, one that is incompatible with the object and purpose of a treaty, it may be bound by the treaty without the benefit of the reservation, should another party properly object to the reservation on that basis.

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The United States does not agree. . . . [C]ertainly, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties (VCLT), reservations that are incompatible with the object and purpose of a treaty are not permitted. Nevertheless, an objecting State must determine if it is desirable to remain in a treaty relationship with a reserving State on the basis of an objectionable reservation; the reserving State can always withdraw its reservation. To suggest that a State can be bound to a treaty without the benefit of a reservation it has made would be in direct conflict with the basic principle of consent.

### 4. Effect of Armed Conflicts on Treaties

On November 29, 2005, Elizabeth Wilcox, Deputy Legal Adviser, U.S. Mission to the United Nations, addressed the Sixth Committee on Agenda Item 80, Report of the International Law Commission on the Work of its 57th Session—Effect of Armed Conflicts on Treaties.

The full text of Ms. Wilcox's statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Report of the International Law Commission is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm). The Report of the Sixth Committee on the relevant session is found in U.N. Doc. A/C.6/60/SR.20, which includes the substance of the U.S. statement at 6-7, available at <http://documents.un.org>.

\* \* \* \*

As we all know, the Commission has made a substantial contribution to international law through its work on three multilateral conventions on the law of treaties. . . . The Commission's work on this important topic can make a further contribution to the codification and development of international law relating to treaties. It is encouraging to see that the Special Rapporteur has adopted an approach that would encourage continuity of treaty obligations in armed conflict in cases where there is no genuine need for suspension or termination.

While the Special Rapporteur produced an entire set of draft articles, I will not attempt to discuss each of them and will not dwell on drafting points. I prefer to mention several issues that my government considers to be important so that the members of the Sixth Committee and the Commission may consider them as work continues on this topic.

Article 4, a key article in the draft, deals with the factor or factors that indicate whether or not a treaty may be terminated or suspended in cases of armed conflict. The Special Rapporteur considered that the intention of the parties at the time of the conclusion of the treaty should be determinative. This seems to my government to be problematic, since generally when parties negotiate a treaty they do not consider how its provisions might apply during armed conflict. In order to address the issue, it is necessary to consider other factors, including the object and purpose of the treaty, the character of the specific provisions in question, and the circumstances relating to the conflict. Acknowledgment of the relevance of such factors is more sensible than reliance on a presumption of intention that may not exist.

Article 5 states that treaties applicable to situations of armed conflict in accordance with their express conditions are operative in cases of armed conflict. A summary of the debate in the Commission included a suggestion that reference should be made in the article to the principle enunciated by the International Court of Justice in the *Nuclear Weapons* advisory opinion and reiterated in other opinions that while certain human rights and environmental principles do not cease in time of armed conflict, their application is determined by “the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” My government is pleased to note that in his concluding remarks the Special Rapporteur agreed that the principle enunciated in the Advisory Opinion should be appropriately reflected in this article.

Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic

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because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.

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### Cross References

*No private remedy created by VCCR, Chapter 2.A.1.c(1) and A.2.  
Self-executing treaty analysis in Puerto Rican voting rights claim,  
Chapter 5.B.1.*

*Participation of Taiwan in fisheries treaties, Chapter 13.A.2.c.(1)  
and (2).*



## CHAPTER 5

### Foreign Relations

#### A. FOREIGN RELATIONS LAW OF THE UNITED STATES

##### 1. Status of Coalition Provisional Authority and Certain Funds

In an order issued July 11, 2005, the U.S. District Court for the Eastern District of Virginia denied defendant contractors' motions for summary judgment in a case alleging submission of "tens of millions of dollars in false claims to the Coalition Provisional Authority (CPA), the agency established in Iraq in 2003 to administer and rebuild Iraq during the transition from the overthrown Hussein regime to the new democratic government of Iraq." *United States of America ex rel. DR, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005). Defendants' contracts with the CPA involved work related to the Baghdad International Airport ("BIAP") and the Iraqi Currency Exchange ("ICE"); the action was brought under the False Claims Act, 31 U.S.C. §§ 3729-32 ("FCA").

The court noted at the outset that "[t]he novel, threshold question presented is whether the FCA applies to claims submitted to the CPA," explaining:

In its simplest terms, to establish a prima facie case under § 3729(a)(1) of the FCA, a plaintiff must establish the following elements: (i) a "claim" (ii) that is "knowingly . . . false or fraudulent," and (iii) "presented to an officer or employee of the United States" for payment or approval. . . . [T]he central issues for resolution are (i) whether the requests for payment

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submitted by Custer Battles to the CPA in furtherance of the BIAP and ICE contracts were false or fraudulent “claim[s]” within the meaning of the FCA, and (ii) whether they were presented to an officer of the United States government. . . .

In denying defendants’ motion for summary judgment, the court stated that “unless new facts come to light, the case will proceed primarily on a single issue: whether the claims for payment presented by defendants to the CPA were “knowingly false or fraudulent.”

As an initial matter, the court rejected defendants’ arguments that no “claim” had been stated within the meaning of the FCA, as excerpted below.

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The CPA conducted its operations and awarded contracts for projects intended to promote Iraq’s reconstruction from four primary funding sources: (i) funds appropriated by Congress from the general revenues of the United States (hereinafter “Appropriated Funds”); (ii) Iraqi funds confiscated by the President and vested in the Department of the Treasury (hereinafter “Vested Funds”); (iii) Iraqi state assets, primarily in the form of currency and negotiable instruments, seized by the Coalition Forces occupying Iraqi territory (hereinafter “Seized Funds”), and (iv) funds from the Development Fund for Iraq (DFI). Significantly, it is undisputed that the contracts awarded to Custer Battles did not obligate U.S. Appropriated Funds. Each of the three other funding sources, however, was used to pay invoices submitted by Custer Battles for payment on the two contracts at issue. . . .

\* \* \* \*

. . . § 3729(a)(1) requires a “claim,” or a request or demand for payment that if paid would result in economic loss to the government fisc, *i.e.* a request for payment from government funds; it does not extend to cases where the government acts solely as a custodian, bailee, or administrator, merely holding or managing property for the benefit of a third party. The significance of this

conclusion for this case is that if the funds used to pay the Custer Battles contracts were “Iraqi funds,” even if administered or held in the possession of the United States, then the presentment of a fraudulent request for payment from these funds does not constitute a “claim” within the meaning of the FCA. On the other hand, if the funds used to pay for the contracts belonged to the United States, then FCA liability may attach if Custer Battles knowingly presented a false or fraudulent claim to a United States government officer for payment from these funds. . . .

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After examining each of the three funding sources involved in the contracts at issue, the court concluded that the Seized and Vested Funds were U.S. funds and therefore “any request submitted to the CPA for payment from Seized or Vested Funds constituted a ‘claim’ within the meaning of the FCA. Requests for payment from funds in the Development Fund for Iraq (“DFI”), however, were requests for Iraqi funds and thus did not constitute an FCA ‘claim.’”

Next, the court found that the statutory requirement that a claim be “knowingly present[ed] or caus[ed] to be presented, to an officer or employee of the United States Government or a member of the Armed Services of the United States” was also met. As to the CPA, the court held that it was “unnecessary to reach and decide *at this time* whether the CPA is an instrumentality of the United States.” (Emphasis in the original). The court continued:

. . . [E]ven assuming the CPA was not an instrumentality of the United States . . . when a contractor submitted a false or fraudulent invoice for payment to a CPA Contracting Officer, like any subcontractor submitting a false invoice for payment to a contractor, those contractors “*caused*” the CPA Contracting Officer to present a request for payment, inflated by the value of the false claim, to an officer of the United States Army. 31 U.S.C. § 3729(a)(1).

(Emphasis in the original).

At the invitation of the court, on April 1, 2005, the United States filed a brief stating its position that the action was

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properly brought under the FCA and that resolution of the status of the CPA was unnecessary to that conclusion. On April 22, 2005, the United States filed a supplemental brief, in response to an April 12 order from the district court directing the United States to address the question “whether the CPA is an entity, agency, or instrumentality of the United States for the False Claims Act.”

While reiterating its view that the status of the CPA need not be resolved in this case, the supplemental brief stated that the United States “believes that the CPA is an instrumentality of the United States for purposes of the False Claims Act.” In reaching this conclusion, the brief first examined “a general set of criteria for determining whether an entity is part of the U.S. government for purposes of the FCA” from Supreme Court cases that had examined the FCA in other contexts, *Rainwater v. United States*, 356 U.S. 590 (1958), *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), and *United States v. McNinch*, 356 U.S. 595 (1958).

Excerpts from the April 22 brief setting forth the U.S. analysis and additional factors in reaching its conclusion as to the CPA’s status under the FCA are set forth below. The full text of the brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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**The Circumstances of Its Creation.** The CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks, United States Army, who was also the Commander of the U.S. Central Command. The establishment of the CPA by the Coalition was formally recognized by UNSCR 1483. Since the Coalition Forces had established and exercised actual authority over the territory of Iraq, under the laws of war and occupation, the authority of the defeated Iraqi regime of Saddam Hussein passed into the hands of the Coalition Forces. General Franks established the CPA under the laws of war to perform civil government functions in liberated Iraq during the brief occupation.

The CPA, however, was not created or explicitly authorized by Congress. Moreover, Congress, almost six months after the CPA was established, regarded the CPA as having been “established pursuant to United Nations Security Council resolution including Resolution

1483.” Emergency Supplemental Appropriations, 117 Stat. 1209, 1226.<sup>3</sup> On the other hand, in the same Emergency Supplemental Appropriations Act, Congress included several provisions that tend to characterize the CPA as an entity of the United States. Congress appropriated money and authorized the President to “apportion” the money among several government departments and “the Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government).” *Id.*, at 1225. Section 2208 provided,

Any reference in this chapter to the “Coalition Provisional Authority in Iraq” or the “Coalition Provisional Authority” shall be deemed to include any successor United States Government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq.

*Id.* at 1231. Thus, although Congress did not create the CPA, it nevertheless regarded it in certain respects as being an entity of the United States Government and recognized that it might be succeeded by a United States Government entity. Finally, in legislation enacted even later, Congress included the CPA as being among U.S. government organizations.<sup>4</sup>

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<sup>3</sup> The President stated upon signing H.R. 3289 (Public Law 108-106), the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, that “[t]he Act incorrectly refers to the Coalition Provisional Authority (CPA) as if it were established pursuant to U.N. Security Council resolutions. The executive branch shall construe the provision to refer to the CPA as established under the laws of war for the occupation of Iraq.” Statement by the President on H.R. 3289, Nov. 6, 2003.

<sup>4</sup> See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1042(b)(2)(N), 118 Stat. 1811, 2050 (2004) (requiring the Secretary of Defense to submit a report containing a “description of the coordination, communication, and unity of effort between the Armed Forces, the Coalition Provisional Authority, other United States government agencies and organizations. . . .”); and National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 § 1203(b), 117 Stat. 1392, 1648 (2003) (requiring the Secretary of Defense to submit a report discussing the “evolution of the organizational structure of the civilian groups reporting to the Secretary, including . . . the Office of the Coalition Provisional Authority, on issues of Iraqi administration and reconstruction” and “[t]he relationship of Department of Defense entities, including . . . the Office of the Coalition Provisional Authority”).

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**Supervision, Appointment, and Direction.** The circumstances of the CPA's supervision indicate that it may be an instrumentality of the government. The CPA Administrator was subject to the direction of the President. Administrator Bremer served as Presidential Envoy and reported to the President through the Secretary of Defense.<sup>5</sup> The Secretary of Defense in turn designated Ambassador Bremer as the Administrator of the CPA.

**Funding.** The CPA's operating funds were appropriated by Congress. . . . The President could also apportion up to approximately \$186 million out of the \$18.6 billion for the IRRF [Iraq Relief and Reconstruction Fund] to the CPA for its operating expenses. Those operating appropriations that remained when the CPA was terminated were to be transferred to the Department of State.

The CPA, on behalf of the Iraqi people, also managed more than \$20 billion in funds derived from other sources, including vested and seized funds and the Development Fund for Iraq. (fn. omitted) The balance of these assets remaining at the time of the CPA's termination, including those in the Central Bank of Iraq, was transferred to the Iraq Ministry of Finance, although there still remain some Vested Funds in the Treasury account, . . . and some relatively small amount of Seized Funds remains under the possession and control of the United States as a member state of the Coalition.

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<sup>5</sup> The President's letter of appointment for Ambassador Bremer of May 9, 2003 stated:

Exercising my constitutional authority as Commander in Chief, and consistent with pertinent statutes, I hereby appoint you to serve as my Presidential Envoy to Iraq, reporting through the Secretary of Defense. Subject to the authority, direction, and control of the Secretary of Defense, you are authorized to oversee, direct, and coordinate all United States Government (USG) programs and activities in Iraq, except those under the command of the Commander, U.S. Central Command. This authority includes the responsibility to oversee the use of USG appropriations in Iraq, as well as Iraqi state- or regime-owned property that is properly under U.S. possession and made available for use in Iraq to assist the Iraq[i] people and support the recovery of Iraq. You and the Commander, U.S. Central Command, will communicate fully and continually, and cooperate in carrying out your respective responsibilities.

By memorandum of May 10, 2004, entitled "United States Government Operations In Iraq", the President directed: "The CPA shall terminate not later than June 30, 2004."

**Employment of Its Personnel.** Many if not most officers and employees of the CPA were employees of the United States. (fn. omitted) Others were employees of other member states of the Coalition.

**Budgetary, Auditing, and Fiscal Controls.** At the time the two contracts at issue here were entered into, the U.N. had determined that the DFI was to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq . . . UNSCR1483, ¶ 12.

While Congress initially imposed no close budgetary, auditing and fiscal controls over the CPA operations with regard to the DFI that resemble those imposed on the ordinary government agency, after the contract prices had been determined and defendants had partially performed, Congress created the Office of Inspector General for the CPA to perform those types of oversight functions. In November 2003, as part of the Emergency Supplemental Appropriation Act, in Title III, Congress created the CPA-IG to provide oversight of the CPA's operation and programs. 117 Stat. 1209, 1234.<sup>8</sup>

Of some interest, Congress redesignated the CPA-IG as the Special Inspector General for Iraqi Reconstruction (SIGIR) in the Na-

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<sup>8</sup> [In statements at the time of signing statutes creating the Inspector General ("IG") of the CPA (Nov. 6, 2003), and later the Special Inspector General for Iraqi Reconstruction (Oct. 29, 2004; variations from the 2003 statement indicated in brackets below), President Bush stated that the provisions]

shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The CPA IG [Special Inspector General] shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations by other administrative units [by administrative units] of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security. The Secretary of Defense [The Secretary of State and the Secretary of Defense jointly] may make exceptions to the foregoing direction in the public interest.

Thus, the President, in whom the Constitution vests the authority to "take Care that the Laws be faithfully executed," U.S. Const. Art II, 3, recognized that he possessed, and exercised, constitutional authority to supervise as part of the unitary executive branch, the Inspector General of the CPA and the Special Inspector General for Iraqi Reconstruction.

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tional Defense Authorization Act for Fiscal Year 2005, Pub.L. 108-375. Additionally, Congress modified the scope of SIGIR's responsibilities from having oversight over the operations of the CPA to having oversight over the activities funded with amounts appropriated or otherwise made available to the Iraq Relief and Reconstruction Fund. In any event, these are not the type of controls normally imposed on the ordinary government agency, and certainly whatever the budgetary, auditing, and fiscal controls the IG represented, they had little, if any, impact on CPA's use of the DFI.

As for controls that are normally imposed on the ordinary government agency's contracting procedures and requirements, those CPA contracts executed with vested, seized or DFI funds, which includes the BIAP and ICE contracts at issue in this litigation, were not subject to the Federal Acquisition Regulations (FAR) or any other federal requirements such as the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a. Thus, and perhaps more significantly here, neither of the two contracts at issue here were governed by the FAR or TINA or similar U.S. contracting procedures, whether statutory or regulatory. The CPA established contracting procedures that are analogous to the competition, transparency, and accountability standards applicable to federally funded U.S. contracts. The CPA administered its contracts in much the same manner as the U.S. Army manages its contracts and utilized U.S. government contracting forms. That appears to be the case for the two contracts between defendants and the CPA at issue here. And, as described in our earlier brief, at least the flow of Vested and Seized funds was handled primarily by U.S. officials and employees and quite similarly to how contract funds are handled domestically.

**Its Structure.** The United States and the United Kingdom, and other member states of the Coalition were the occupying powers in Iraq under the laws and usages of war. The CPA was the administrative device that the Coalition created under the laws and usages of war to perform civil government functions in liberated Iraq during the brief period of occupation. As an active member of the Coalition, the United States played an important role in, and had certain responsibilities for, the occupation, which it chose to fulfill through creation of and participation in the CPA.



The CPA's structure was not established by Congress, and thus, the structure is not the typical congressionally created administrative device to fulfill a governmental function. The purpose of the CPA, however, was to exercise, under the laws and usages of war, the powers of government temporarily, and, among other things, thereby to provide security to allow the delivery of humanitarian aid. That purpose certainly was in concert with the policies of the United States for the temporary governance of Iraq after its liberation and for the relief and reconstruction of Iraq. Moreover, the CPA certainly performed governmental functions, including some that the U.S. was responsible for as an occupying power.

Thus, after considering these questions, one must conclude that, in some respects, the CPA shares attributes with entities in *Rainwater* and *McNinch* that the Supreme Court determined were "part of 'the Government [of the] United States' for purposes of the [FCA]." *Rainwater* at 592, and *McNinch* at 598. In other significant respects, the CPA lacks certain attributes that the Supreme Court identified in *Rainwater* and *McNinch*. The CPA is *sui generis*.

The United States's position in this case is a narrow one, carefully tailored to the facts of this case: the CPA was a U.S. instrumentality for purposes of the FCA. We note that the CPA may have a different character in other contexts and for other purposes that are not and do not need to be addressed in this case.<sup>9</sup> As we noted, the overriding purpose of the FCA is to provide a broad protection of the government from all fraudulent attempts to cause the government to pay out sums of money. The Supreme Court has held that in interpreting a remedial statute, it is appropriate to construe it broadly in such a manner as to fulfill its overall legislative purposes. . . .

Consistent with these cases and the broad protections of funds provided by the FCA, two factors tip the scale in favor of the conclusion that the CPA should be deemed to be an instrumentality of the United States for purposes of the False Claims Act. First is the nature of the appointment and supervision of Ambassador Bremer as Presidential Envoy and Administrator of the CPA. All authority

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<sup>9</sup> For some purposes, the CPA may also have been an instrumentality of a coalition of both the United States and the United Kingdom, but that would have no relevance to the analysis of the applicability of the FCA and hence no relevance to this case.

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of the CPA rested in the Administrator, and Ambassador Bremer was employed by the United States, served at the pleasure of the President, and was under the supervision of the President and the Secretary of Defense.

Second, coupled with the status of Ambassador Bremer, is the fact that all of the money used for the two contracts at issue in this case was spent only on the authority and control of an officer or employee of the United States or a member of the Armed Forces of the United States. As described in our opening brief, all the funds utilized for payment of the BIAP and ICE contracts were funds in which the United States had an interest or exercised certain dominion and were to be paid out, provided or approved by the United States and were ultimately presented to an officer or employee of the United States government.

Thus, while we emphasize again that the answer to the Court's latest question on the nature of the CPA is not necessary to determine whether or not defendants violated the FCA when they presented claims to the CPA under the two contracts at issue in this litigation, we nevertheless conclude that the CPA is an instrumentality of the United States for purposes of the False Claims Act.

### 2. Prosecution in Scheme to Smuggle Liquor into Canada

On April 26, 2005, the U.S. Supreme Court affirmed a decision *en banc* of the Court of Appeals for the Fourth Circuit holding that a scheme to defraud a foreign government of tax revenue violated the federal wire fraud statute. *Pasquantino v. United States*, 544 U.S. 349 (2005), *reh'g denied* 125 S. Ct. 2931 (June 20, 2005). The Supreme Court granted certiorari to resolve a conflict in the circuits on the issue presented; compare *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) with *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997).

Petitioners in *Pasquantino* were convicted of federal wire fraud charges in connection with the smuggling of large quantities of liquor into Canada from the United States, avoiding Canadian taxes that were "approximately double the liquor's purchase price." In affirming the Fourth Circuit, the

Supreme Court rejected the argument that the case was barred by the common-law revenue rule:

At common law, the revenue rule generally barred courts from enforcing the tax laws of foreign sovereigns. The question presented in this case is whether a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute, 18 U.S.C. § 1343 (2000 ed., Supp. II). Because the plain terms of § 1343 criminalize such a scheme, and because this construction of the wire fraud statute does not derogate from the common-law revenue rule, we hold that it does.

Excerpts follow from the Court's discussion of the revenue rule and its relationship to U.S. criminal law, as well as related foreign relations considerations (footnotes omitted).

\* \* \* \*

### III

. . . Petitioners argue that, to avoid reading § 1343 to derogate from the common-law revenue rule, we should construe the otherwise-applicable language of the wire fraud statute to except frauds directed at evading foreign taxes. Their argument relies on the canon of construction that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident.” *United States v. Texas*, 507 U.S. 529, 534, 123 L. Ed. 2d 245, 113 S. Ct. 1631 (1993) (internal quotation marks and citation omitted). This presumption is, however, no bar to a construction that conflicts with a common-law rule if the statute “‘speak[s] directly’ to the question addressed by the common law.” *Ibid.* (citations omitted).

Whether the wire fraud statute derogates from the common-law revenue rule depends, in turn, on whether reading § 1343 to reach this prosecution conflicts with a well-established revenue rule principle. . . . [B]efore we may conclude that Congress intended to exempt the present prosecution from the broad reach of the wire fraud statute, we must find that the common-law revenue

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rule clearly barred such a prosecution. We examine the state of the common law as of 1952, the year Congress enacted the wire fraud statute. See *Neder v. United States*, 527 U.S. 1, 22-23, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999).

The wire fraud statute derogates from no well-established revenue rule principle. We are aware of no common-law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes. The traditional rationales for the revenue rule, moreover, do not plainly suggest that it swept so broadly. We consider these two points in turn.

### A

We first consider common-law revenue rule jurisprudence as it existed in 1952, the year Congress enacted § 1343. Since the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the rule that, as Chief Justice Marshall put it, “[t]he Courts of no country execute the penal laws of another.” *The Antelope*, 23 U.S. 66, 123, 10 Wheat. 66, 6 L. Ed. 268 (1825). The rule against the enforcement of foreign penal statutes, in turn, tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed. See, e.g., J. Story, *Commentaries on the Conflict of Laws* § 620, p 840 (M. Bigelow ed. 8th ed. 1883). The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws. See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290, 32 L. Ed. 239, 8 S. Ct. 1370 (1888); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 219 (1932) (hereinafter Leflar).

Courts first drew that inference in a line of cases prohibiting the enforcement of tax liabilities of one sovereign in the courts of another sovereign, such as a suit to enforce a tax judgment. The revenue rule’s grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations. Unsurprisingly, then, the revenue rule is often stated as prohibiting the collection of foreign tax claims. . . .

The present prosecution is unlike these classic examples of actions traditionally barred by the revenue rule. It is not a suit that recovers a foreign tax liability, like a suit to enforce a judgment. This is a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct. Petitioners nevertheless argue that common-law revenue rule jurisprudence as of 1952 prohibited such prosecutions. Revenue rule cases, however, do not establish that proposition, much less clearly so.

1

Petitioners first analogize the present action to several cases that have applied the revenue rule to bar indirect enforcement of foreign revenue laws, in contrast to the direct collection of a tax obligation. They cite, for example, a decision of an Irish trial court holding that a private liquidator could not recover assets unlawfully distributed and moved to Ireland by a corporate director, because the recovery would go to satisfy the company's Scottish tax obligations. *Peter Buchanan Ltd. v. McVey*, 1955 A. C. 516, 529-530 (Ir. H. Ct. 1950), app. dism'd, 1955 A. C. 530 (Ir. Sup. Ct. 1951). The court found that "the sole object of the liquidation proceedings in Scotland was to collect a revenue debt," because if the liquidator won, "every penny recovered after paying certain costs . . . could be claimed by the Scottish Revenue." *Id.*, at 530. According to the *Buchanan* court, "[i]n every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected." *Id.*, at 529.

*Buchanan* and the other cases on which petitioners rely cannot bear the weight petitioners place on them. Many of them were decided after 1952, too late for the Congress that passed the wire fraud statute to have relied on them. Others come from foreign courts. Drawing sure inferences regarding Congress' intent from such foreign citations is perilous, as several of petitioners' cases illustrate.

More important, none of these cases clearly establishes that the revenue rule barred this prosecution. None involved a domestic sovereign acting pursuant to authority conferred by a criminal statute. The difference is significant. An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the

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enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension, to our knowledge, is unprecedented in the long history of either the revenue rule or the rule against enforcement of penal laws.

Moreover, none of petitioners' cases (with the arguable exception of *Banco Do Brasil, S. A. v. A. C. Israel Commodity Co.*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (App. 1963)) barred an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement. . . .

\* \* \* \*

2

We are no more persuaded by a second line of cases on which petitioners rely. Petitioners analogize the present case to early English common-law cases from which the revenue rule originally derived. Those early cases involved contract law, and they held that contracts executed with the purpose of evading the revenue laws of other nations were enforceable, notwithstanding the rule against enforcing contracts with illegal purposes. See *Boucher v. Lawson*, Cas. T. Hard. 85, 89-90, 95 Eng. Rep. 53, 55-56 (K. B. 1734); *Planche v. Fletcher*, 1 Dougl. 251, 99 Eng. Rep. 164 (K. B. 1779). Petitioners argue that these cases demonstrate that “indirect” enforcement of revenue laws is at the very core of the common-law revenue rule, rather than at its margins.

The argument is unavailing. By the mid-20th century, the revenue rule had developed into a doctrine very different from its original form. Early revenue rule cases were driven by the interest in lessening the commercial disruption caused by the high tariffs of the day. As Lord Hardwicke explained, if contracts that aimed at circumventing foreign revenue laws were unenforceable, “it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade.” *Boucher, supra*, at 89, 95 Eng. Rep., at 56. By the 20th century, however, that rationale for the revenue rule had been supplanted. By then, as we have explained, courts had begun to apply the revenue rule to tax obligations on the strength of

the analogy between a country's revenue laws and its penal ones, see *supra*, at 8-9, superseding the original promotion-of-commerce rationale for the rule. Dodge, Breaking the Public Law Taboo, 43 Harv. Int'l L. J. 161, 178 (2002); *Buchanan*, 1955 A. C., at 522-524, 528-529. The early English cases rest on a far different foundation from that on which the revenue rule came to rest. They thus say little about whether the wire fraud statute derogated from the revenue rule in its mid-20th century form.

3

Granted, this criminal prosecution "enforces" Canadian revenue law in an attenuated sense, but not in a sense that clearly would contravene the revenue rule. From its earliest days, the revenue rule never proscribed all enforcement of foreign revenue law. For example, at the same time they were enforcing domestic contracts that had the purpose of violating foreign revenue law, English courts also considered void foreign contracts that lacked tax stamps required under foreign revenue law. See *Alves v. Hodgson*, 7 T. R. 241, 243, 101 Eng. Rep. 953, 955 (K. B. 1797); *Clegg v. Levy*, 3 Camp. 166, 167, 170 Eng. Rep. 1343, 1343 (N. P. 1812). Like the present prosecution, cases voiding foreign contracts under foreign law no doubt "enforced" foreign revenue law in the sense that they encouraged the payment of foreign taxes; yet they fell outside the revenue rule's scope. The line the revenue rule draws between impermissible and permissible "enforcement" of foreign revenue law has therefore always been unclear.

The uncertainty persisted in American courts that recognized the revenue rule. . . .

\* \* \* \*

B

Having concluded that revenue rule jurisprudence is no clear bar to this prosecution, we next turn to whether the purposes of the revenue rule, as articulated in the relevant authorities, suggest differently. They do not.

First, this prosecution poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other

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sovereigns. See, e.g., *Moore v. Mitchell*, 30 F.2d 600, 604 (CA2 1929) (L. Hand, J., concurring). As Judge Hand put it, allowing courts to enforce another country's revenue laws was thought to be a delicate inquiry

“when it concerns the relations between the foreign state and its own citizens. . . . To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities.” *Ibid.*

The present prosecution creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns. This action was brought by the Executive to enforce a statute passed by Congress. In our system of government, the Executive is “the sole organ of the federal government in the field of international relations,” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 81 L. Ed. 255, 57 S. Ct. 216 (1936), and has ample authority and competence to manage “the relations between the foreign state and its own citizens” and to avoid “embarrass[ing] its neighbor[s],” *Moore, supra*, at 604 (L. Hand, J., concurring); see also *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111, 92 L. Ed. 568, 68 S. Ct. 431 (1948). True, a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U. S. law. But we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any. The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have “neither aptitude, facilities nor responsibility” to evaluate. *Ibid.*

More broadly, petitioners argue that the revenue rule avoids giving domestic effect to politically sensitive and controversial pol-



icy decisions embodied in foreign revenue laws, regardless of whether courts need pass judgment on such laws. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) (White, J., dissenting) (“[C]ourts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign”). This worries us little here. The present prosecution, if authorized by the wire fraud statute, embodies the policy choice of the two political branches of our Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the object of the fraud. Such a reading of the wire fraud statute gives effect to that considered policy choice. It therefore poses no risk of advancing the policies of Canada illegitimately.

Still a final revenue rule rationale petitioners urge is the concern that courts lack the competence to examine the validity of unfamiliar foreign tax schemes. See, *e.g.*, Leflar 218. Foreign law, of course, posed no unmanageable complexity in this case. The District Court had before it uncontroverted testimony of a [Canadian] Government witness that petitioners’ scheme aimed at violating Canadian tax law. . . .

Nevertheless, Federal Rule of Criminal Procedure 26.1 addresses petitioners’ concern by setting forth a procedure for interpreting foreign law that improves on those available at common law. Specifically, it permits a court, in deciding issues of foreign law, to consider “any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.” By contrast, common-law procedures for dealing with foreign law—those available to the courts that formulated the revenue rule—were more cumbersome. See Advisory Committee Notes on Fed. Rule Crim. Proc. 26.1 (noting that the rule improves on common-law procedures for proving foreign law). Rule 26.1 gives federal courts sufficient means to resolve the incidental foreign law issues they may encounter in wire fraud prosecutions.

#### IV

Finally, our interpretation of the wire fraud statute does not give it “extraterritorial effect.” *Post*, at \_\_\_\_, 161 L. Ed. 2d, at 647

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(Ginsburg, J., dissenting). Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States. . . .

\* \* \* \*

### 3. Executive-Legislative Separation of Powers

From time to time, in signing federal legislation into law, the President includes language in his signing statement preserving his constitutional prerogatives where he deems aspects of the legislation to be inconsistent with those prerogatives. *See Cumulative Digest 1991–1999* at 801–02. For examples during 2005, *see* Chapter 11.C.3. (Pub. L. 108-215, amending the NAFTA Implementation Act) and Chapter 18.A.3.c. (Pub. L. 109-148, containing the Detainee Treatment Act).

## B. CONSTITUENT ENTITIES

### 1. Puerto Rico: Voting Rights

On August 3, 2005, the U.S. Court of Appeals for the First Circuit sitting *en banc* affirmed a decision of the U.S. District Court for the District of Puerto Rico rejecting a claim by a U.S. citizen residing in Puerto Rico to a constitutional right to vote for the President and Vice President of the United States. *Igartua de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005). The court explained:

This case brings before this court the third in a series of law suits by Gregorio Igartua, a U.S. citizen resident in Puerto Rico, claiming the constitutional right to vote quadrennially for President and Vice President of the United States. Panels of this court have rejected such claims on all three occasions. We now do so again, this time *en banc*, rejecting as well an adjacent claim: that the failure of the Constitution to grant this vote should be declared a violation of U.S. treaty obligations. (footnote omitted).

Excerpts below set forth the court's analysis of the constitutional issue in light of Puerto Rico's status and the court's rejection of any claim based on international instruments cited by the plaintiff (most footnotes omitted).

\* \* \* \*

The constitutional claim is readily answered. Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution. This provision does not confer the franchise on "U.S. citizens" but on "Electors" who are to be "appointed" by each "State," in "such Manner" as the state legislature may direct, equal to the number of Senators and Representatives to whom the state is entitled. U.S. Const. art. II, § 1, cl. 2; see also *id.* amend. XII.

\* \* \* \*

Puerto Rico—like the District of Columbia, the Virgin Islands, and Guam—is not a "state" within the meaning of the Constitution. *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992). . . . Nor has it been given electors of its own, as was the District of Columbia in the Twenty-Third Amendment.

Puerto Rico became associated with the United States as an unincorporated territory under Article IV of the Constitution following the 1898 war between this country and Spain. U.S. Const. art. IV, § 3, cl. 2; see *De Lima v. Bidwell*, 182 U.S. 1, 21 S. Ct. 743, 45 L. Ed. 1041 (1901). Its status has altered over the ensuing period, culminating in an agreement in 1952, approved by the citizens of Puerto Rico, that Puerto Rico should have a unique "Commonwealth" status; but the unique status is not statehood within the meaning of the Constitution. . . . And, in recent elections, Puerto Ricans themselves have been substantially divided as to whether to seek statehood status. *Cf. Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 4-5 (1st Cir. 2004).

As Puerto Rico has no electors, its citizens do not participate in the presidential voting, although they may do so if they take up residence in one of the 50 states and, of course, they elect the Governor of Puerto Rico, its legislature, and a non-voting delegate to

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Congress. Like each state's entitlement to two Senators regardless of population, the make-up of the electoral college is a direct consequence of how the framers of the Constitution chose to structure our government—a choice itself based on political compromise rather than conceptual perfection. . . .

That the franchise for choosing electors is confined to “states” cannot be “unconstitutional” because it is what the Constitution itself provides. . . . The path to changing the Constitution lies not through the courts but through the constitutional amending process, U.S. Const. art. V; and the road to statehood—if that is what Puerto Rico's citizens want—runs through Congress. U.S. Const. art. IV, § 3, cl. 1.

\* \* \* \*

Igartua's complaint also relied upon U.S. treaties—technically, two of the three are not treaties—as a premise for the suffrage right claimed. This theory had been advanced and rejected by this court in *Igartua I*, 32 F.3d at 10 n.1, which was binding on the panel and could not be altered by it. . . .

No treaty claim, even if entertained, would permit a court to order that the electoral college be enlarged or reapportioned. Treaties—sometimes—have the force of domestic law, just like legislation; but the Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-18, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (plurality opinion); *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984); *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983) (collecting case law). See also *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 180, 2 L. Ed. 60 (1803) (“a law repugnant to the constitution is void”). . . .

There are a host of problems with the treaty claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered. Treaties are made between states (in the international usage of that term) and citizens do not automatically have a right to sue upon them. The present claim is also probably not justiciable in the sense that any effective relief could be provided; it is enough to let common sense play upon the

conjecture that the Constitution would be amended if only a federal court declared that a treaty's generalities so required. . . .

Nor are the merits of Igartua's reading of the treaties at all straightforward. The language of each of the treaties invoked is general. Nothing in them says anything about just who should be entitled to vote for whom, or that an entity with the negotiated relationship that the United States has with Puerto Rico is nevertheless required to adopt some different arrangement as to governance or suffrage. . . .

We think it unnecessary to plumb these questions, whether of preconditions to suit or the meaning of the treaties, because none of these treaties comprises domestic law of the United States and so their status furnishes the clearest ground for denying declaratory relief. . . .

. . . The United States has signed numerous treaties over the years, many containing highly general and ramifying statements. Some as negotiated by the President are merely aspirational and not law in any sense. Others may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms. The law to this effect is longstanding. See *Whitney v. Robertson*, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829) (Marshall, C.J.).

The treaties in question here do not adopt any legal obligations binding as a matter of domestic law. The Universal Declaration of Human Rights is precatory: that is, it creates aspirational goals but not legal obligations, even as between states. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 2767, 159 L. Ed. 2d 718 (2004). This is also true of the Inter-American Democratic Charter.<sup>6</sup> The final instrument, the International Covenant on Civil and Political Rights, is a ratified treaty but was submitted and ratified on the express condition that it would be "not self-executing." 138

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<sup>6</sup> See Remarks of U.S. Ambassador Roger Noriega at Organization of American States Permanent Council Meeting (Sept. 6, 2001), in *Digest of United States Practice in International Law: 2001* at 347, Office of the Legal Advisor, U.S. Department of State (Sally J. Cummins & David P. Stewart eds., 2001) ("The United States understands that this Charter does not establish any new rights or obligations under either domestic or international law.").

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Cong. Rec. S4781, S4784 (daily ed. Apr. 2, 1992). Indeed, *Sosa* used it as an example of such a treaty, saying:

Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

124 S. Ct. at 2763.

Whatever limited room there may be for courts to second-guess the joint position of the President and the Senate that a treaty is not self-executing—and we are pretty skeptical of such a suggestion in light of “the discretion of the Legislative and Executive Branches in managing foreign affairs,” *id.*—it is certainly not present in a case in which the Supreme Court has expressed its own understanding of a specific treaty in the terms block quoted above. Indeed, only a few pages later *Sosa* repeated: “The United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” *Id.* at 2767.

. . . . It would ignore, and undermine, th[e] constitutional allocation of functions for a federal court to declare that the United States was nevertheless “violating” such a treaty. In substance, such an exercise would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States.

This intrusive course could also embarrass the United States in the conduct of its foreign affairs, which is “committed by the Constitution to the executive and legislative—‘the political’—departments of the government.” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 62 L. Ed. 726, 38 S. Ct. 309 (1918). Whatever the State Department might later say, such a declaration by a federal court of a supposed “treaty obligation” could be trumpeted as propaganda in international bodies and elsewhere. . . .

The case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means. But the right claimed cannot be imple-

mented by courts unless Puerto Rico becomes a state or until the Constitution is changed (as it has been, at least five times, to broaden the franchise). U.S. Const. amend. XV (race, color, previous servitude); *id.* amend. XIX (sex); *id.* amend. XXIII (District of Columbia); *id.* amend. XXIV (payment of poll or other tax); *id.* amend. XXVI (age eighteen and older). It certainly should not be “declared” by a federal court on the basis of treaties none of which was designed to alter domestic law—and none of which could override the Constitution.

Little need be said of Igartua’s related claim that customary international law, by itself and independent of treaties, requires that he be allowed to vote for President. . . .

Only recently, in *Sosa*, the Supreme Court enjoined great caution in importing such norms into domestic law, even in the context of a federal statute governing alien tort actions that arguably authorized some degree of importation by federal courts. *Sosa* refused to recognize as a norm of customary international law the notion of protection against arbitrary arrest. 124 S. Ct. at 2769. Yet the claim rejected in *Sosa* was a model of precision compared to Igartua’s present claim.

No serious argument exists that customary international law, independent of the treaties now invoked, requires a particular form of representative government. Practice among leading democratic nations shows a diversity as to how governments organize and structure the franchise; in Great Britain, for example, neither the head of state nor of government is directly elected by the public at large. If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law. *Sosa*, 124 S. Ct. at 2768 n.27.

\* \* \* \*

In response to a request from the court of appeals, on April 13, 2005, the United States filed a supplemental brief on (1) the effect of “international legal obligations” of the United States on the eligibility of citizens residing in Puerto Rico to vote for President and Vice-President of the United States and (2) the availability of a declaratory judgment concerning the government’s compliance with these international instruments. As reflected in the court’s decision, the U.S. brief

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argued that none of the three international instruments create legal rights or obligations enforceable in the courts and that no international instrument can alter the U.S. Constitution. Excerpts follow from the brief's argument, addressed only briefly by the court, that "even apart from questions of constitutional supremacy and judicial enforceability, adherence to the electoral college system is not inconsistent with any of the three instruments at issue" (footnotes omitted). The full text of the U.S. brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Each of these instruments speaks generally concerning the right to vote in periodic elections and to take part in the governance of one's country. Those rights are exercised by the citizens of Puerto Rico within the context of a vibrant democratic political system. Federal law establishes Puerto Rico as a Commonwealth with rights of self-government and with numerous statutory and constitutional rights. *See, e.g.*, 48 U.S.C. § 731d; *id.* §§ 734, 737; 8 U.S.C. § 1402; *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992); *Lopez v. Aran*, 844 F.2d 898, 902 (1st Cir. 1988).

And, on the important question of Puerto Rico's status in relation to the United States, the citizens of Puerto Rico have not been denied their right to participate. Commonwealth status, as opposed to statehood, has advantages as well as disadvantages. *See, e.g.*, 26 U.S.C. § 933 (income of Puerto Rico residents is not subject to federal income tax). With full knowledge of both the benefits and drawbacks of statehood, including the implications of status on participation in presidential elections, the citizens of Puerto Rico have voted repeatedly—in 1967, 1993, and 1998—against statehood. *See Trias Monge, Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 Rev. Jur. U.P.R. 1, 12-13, 17, 19 (1999).

The fact that citizens of Puerto Rico do not participate in the selection of the President and Vice President does not violate the terms of any of the three international instruments at issue here.



None of those instruments mandates that every office be subject to that right. No one would suggest, for instance, that these international instruments require the United States to permit the popular election of Supreme Court justices notwithstanding the method of appointment set forth in Article III of the Constitution. Nor could one reasonably argue that these instruments render the structure of the United States Senate invalid because each state receives two senators without regard to population. The notion that the United States negotiated and signed instruments that require it to change the system enshrined in the Constitution for choosing the President and Vice President is fanciful at best.

The ICCPR, for instance, does not require all citizens to vote for all offices. In pertinent part, Article 25 of the Covenant provides that “[e]very citizen shall have the right and the opportunity, without \* \* \* unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote \* \* \* at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the majority.” App. 55.

Plaintiffs nowhere explain how the inability of U.S. citizens in Puerto Rico to vote for President and Vice President unreasonably abridges their rights to “take part in the conduct of public affairs,” which they do through many channels, including the direct election of Puerto Rico officers. In fact, the Covenant’s negotiating history makes clear that Article 25 was not intended to guarantee the right to vote for all public officials; a proposal that would have affirmed the right of every citizen to vote for “all organs of authority” was specifically rejected, on the ground that “not all organs of authority were elective.” M. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* 474 (1987).

Moreover, the Senate expressly conditioned its ratification of the ICCPR on the proviso that “[n]othing in the Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States of America as interpreted by the United States.” 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). An interpretation of the ICCPR to require a change in the constitutional framework procedure for the

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selection of the President and Vice President would be directly contrary to this understanding.

Nor is there anything in the Universal Declaration of Human Rights suggesting that every office—including the President and Vice President of the United States—must be subject to popular election by every United States citizen. Article 21 of the Declaration states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives,” and that the will of the people “shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage \* \* \*.” Universal Declaration, Art. 21.

Yet the Declaration does not provide any guidance as to what transgresses either of these general provisions—neither of which even hints that every citizen must participate in the election of every office. If “everyone” must so participate, then restricting the vote to those above the age of 18 violates the Universal Declaration. And, as noted above, the failure to provide for the election of judicial officers and a host of other appointive posts might be deemed to deprive citizens of “the right to take part in the government” of their country. As we have noted, . . . citizens of Puerto Rico can and do “take part in the government” of their country, and they have vigorously expressed their will through “periodic and genuine elections.”

Finally, the general aspirational provisions of the Inter-American Charter . . . do not purport to alter the specific constitutional scheme for United States presidential elections. The Charter merely states that the people “have a right to democracy” (Art. 1), and that among the “essential elements” of democracy are “the holding of periodic, free, and fair elections based on secret balloting and universal suffrage \* \* \*” (Art. 3). App. 105. Again, nothing in this general language suggests that every citizen must participate in the election of every national office. In fact, the OAS General Assembly expressed its will that these democratic principles operate within existing systems of constitutional democracy, providing for an international enforcement mechanism for instances in which “an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime” occurs. Art. 19, App. 108 (emphasis supplied); *see also* Art. 20-21, . . . The notion that the OAS General Assembly, with full knowledge of the United

States' constitutional system, intended to require the United States to alter its constitutional framework for selecting its President, is flatly inconsistent with this language.

Thus, neither the Universal Declaration nor the Inter-American Democratic Charter can possibly be read as providing clear, enforceable statements of legal obligation requiring the United States to change the electoral college. Rather, these instruments contain principles that "are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree with many of the particulars regarding how actually to achieve them." *Flores*, 343 F.3d at 161. Accordingly, there is no basis upon which to conclude that the current electoral college system mandated by the Constitution violates international instruments that merely contain "abstract rights and liberties devoid of articulable or discernable standards and regulations." *Ibid.* (quoting *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)).

\* \* \* \*

## **2. Commonwealth of the Northern Mariana Islands: Claim to Submerged Lands**

On February 24, 2005, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court ruling granting summary judgment in favor of the United States in a case in which the Commonwealth of the Northern Mariana Islands ("CNMI") attempted to establish that it was the owner of certain submerged lands. *Commonwealth of the Northern Marianas Islands v. United States*, 399 F.3d 1057 (9th Cir. 2005). The Ninth Circuit concluded:

We hold that the United States acquired paramount interest in the seaward submerged lands . . . found off the shores of the Commonwealth of the Northern Mariana Islands. Laws passed by the CNMI legislature to the contrary are inconsistent with the paramouncy doctrine and are preempted by federal law.

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Further excerpts from the Ninth Circuit decision are set forth below (footnotes omitted). The Supreme Court denied certiorari on March 20, 2006, 126 S. Ct. 1566 (2006). *See also Digest 2003* at 275-76 and *Digest 2002* at 246-59.

\* \* \* \*

The CNMI is a commonwealth government comprised of sixteen islands in the West Pacific. Through a Covenant agreement with the United States, the CNMI is under the sovereignty of the United States but retains the “right of local self-government.” Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, §§ 101, 103, Pub. L. No. 94-241, 90 Stat. 263 (1976), reprinted in 48 U.S.C. § 1801 note [hereinafter “Covenant”]. . . .

\* \* \* \*

The Covenant’s ten articles detail the political relationship between the United States and the CNMI. Of particular relevance here is Article I. In addition to guaranteeing the Commonwealth the right of local self-government under the sovereignty of the United States, *see* Covenant §§ 101, 103, Article I provides that the Covenant, “together with those provisions of the Constitution, treaties, and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.” *Id.* § 102. Article I also establishes that the United States has “complete responsibility for and authority with respect to matters relating to foreign affairs and defense.” *Id.* § 104.

Articles V, VIII and X of the Covenant also play central roles in this dispute. Pursuant to Article V, only certain provisions within the United States Constitution and other federal laws are applicable to the Commonwealth. *See id.* §§ 501, 502. Article VIII addresses distribution of “Property” within the Northern Marianas. In relevant part, Section 801 specifies that:

All right, title, and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner what-

soever will, no later than upon the termination of the Trusteeship Agreement, be transferred to the Government of the Northern Mariana Islands.

Finally, Article X controls how and when the provisions of the Covenant come into force. *Id.* § 1003. Some provisions . . . became effective after the official termination of the trusteeship in 1986. *See Sagana v. Tenorio*, 384 F.3d 731, 733-34 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3355 (U.S. Dec. 6, 2004) (No. 04-774). Included in this . . . category are the provisions establishing United States sovereignty and authority over foreign affairs and defense of the Commonwealth. Covenant §§ 101, 104.

**B**

\* \* \* \*

The district court properly granted summary judgment to the United States on the basis of the federal paramountcy doctrine. This doctrine instructs that the United States, as a “function of national external sovereignty,” acquires “paramount rights” over seaward submerged lands. *United States v. California*, 332 U.S. 19, 34, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947). Because the United States did not expressly cede its paramount rights to the submerged lands at issue here, summary judgment in favor of the United States was proper.

\* \* \* \*

Allegiance to the paramountcy doctrine compels us to begin with the presumption that the United States acquired paramount rights to the disputed submerged lands off the CNMI’s shores as a function of sovereignty. As we have held in [*Native Village of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 109 (9th Cir. 1998)] *Eyak I*, the underlying principles of this doctrine apply “with equal force” to relationships other than that between states and the federal government. 154 F.3d at 1096. Through the Covenant, the Commonwealth agreed to United States sovereignty and received (among other benefits) protection and security in return. As the Court recognized in [*United States v. California*, 332 U.S. 19 (1947)], the United States’ foreign affairs obligations demand that the national government have authority to control areas of national concern. *See* 332 U.S. at 35-36. Absent an express indication to the contrary,

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we will not presume the parties intended a different arrangement here.

The CNMI principally challenges the reliance on the paramouncy cases for two reasons. First, the Commonwealth contends that the paramouncy doctrine is inconsistent with the Covenant's limitations on the application of federal law to the CNMI. Second, the CNMI argues alternatively that the Covenant's transfer of real property creates a "recognized exception" to the paramouncy doctrine. We disagree on both counts.

\* \* \* \*

"Once low-water mark is passed the international domain is reached." *Eyak I*, 154 F.3d at 1094 (quoting *Texas*, 339 U.S. at 719). The submerged lands addressed by the district court's summary judgment fit this description. Because the Covenant places sovereignty and foreign affairs obligations in the United States, the paramouncy doctrine applies.

2

The CNMI next argues in the alternative that the Covenant transferred the submerged lands to the Northern Mariana Islands, thereby meeting a recognized exception to the paramouncy doctrine that allows Congress to cede its paramount authority over seaward submerged lands. The fact that the United States *may* provide the submerged lands to the CNMI does not mean it has done so here. Neither the text of the Covenant nor the actions taken by the parties during and after the negotiations lead to a conclusion that such a transaction took place.

\* \* \* \*

A strong presumption of national authority over seaward submerged lands runs throughout the paramouncy doctrine cases, and we extend that same presumption to the case at hand. Absent express indication to the contrary, the ownership of seaward submerged lands accompanies United States sovereignty. The Covenant lacks such an expression.

\* \* \* \*

**Cross References**

*Pre-emption of state law by Presidential determination, Chapter 2.A.1.a. and c.*

*Role of executive branch in extradition, Chapter 3.A.2.*

*Cases presenting non-justiciable political questions, Chapters 8.B.1., 10.A.6.a. and B.3.*

*Controlling executive act and customary international law, Chapter 8.B.3.*





## CHAPTER 6

### Human Rights

#### A. GENERAL

##### 1. Human Rights Reports

On February 8, 2005, the Department of State released the 2004 Country Reports on Human Rights Practices. The document is submitted to Congress annually by the Department of State in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961 ("FAA"), as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for U.S. views on various aspects of human rights practice in other countries. The report is available at [www.state.gov/g/drl/rls/hrrpt/2004/](http://www.state.gov/g/drl/rls/hrrpt/2004/).

On March 28, 2005, the Department of State submitted its report "Supporting Human Rights and Democracy: The U.S. Record 2004-2005." As explained in the Purpose and Acknowledgements section of the report:

This report is submitted to the Congress by the Department of State in compliance with Section 665 of P.L. 107-228, the Fiscal Year 2003 Foreign Relations Authorization Act, which requires the Department to report on actions taken by the U.S. Government to encourage respect for human rights. This third annual submission complements the longstanding Country Reports on Human Rights Practices for 2004, and takes the next step, moving from high-

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lighting abuses to publicizing the actions and programs the United States has taken to end those abuses.

The report and related statements are available at [www.state.gov/g/drl/rls/shrd/2004](http://www.state.gov/g/drl/rls/shrd/2004).

### 2. Periodic Report to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights

On October 21, 2005, the United States submitted the combined Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm). As explained in the introduction provided in Section I, the report supplements the U.S. Initial Report of 1994, information provided by the U.S. delegation at meetings of the Human Rights Committee, which discussed the Initial Report on March 31, 1995, and "takes into account the concluding observations of the Committee, CCPR/C/79/Add.50; A/50/40, paras. 266-304, published 3 October 1995, and the 27 July 2004 letter of the Committee to the United States in which the Committee invited the United States to address several of its specific concerns." *See also Cumulative Digest 1991-1999* at 873-78.

The introduction stated further:

In this consolidated report, the United States has sought to respond to the Committee's concerns as fully as possible notwithstanding the continuing difference of view between the Committee and the United States concerning certain matters relating to the import and scope of provisions of the Covenant. In particular, in regard to the latter, the United States respectfully reiterates its firmly held legal view on the territorial scope of application of the Covenant. *See* Annex I.

Excerpts follow from section II, Implementation of Specific Provisions of the Covenant. Section III, Committee Suggestions and Recommendations, and Annex I, Territorial Scope of

Application of the Covenant, are provided in full. Two additional annexes are attached to the report but not excerpted here: Annex II, Programs to Protect Women from Violence, and Annex III, Refugee Admissions from FY 1994 to FY 2004.

\* \* \* \*

## II. IMPLEMENTATION OF SPECIFIC PROVISIONS OF THE COVENANT

### Article 2—Equal protection of rights in the Covenant

\* \* \* \*

42. Aliens. Under United States immigration law, an alien is “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3). Aliens who are admitted and legally residing in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant rights and protections of citizens, including the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; the right to liberty and security of person; the right to humane treatment for persons deprived of their liberty; freedom from imprisonment for breach of contractual obligation; freedom of movement; the right to fair trial; prohibition of ex post facto laws; recognition as a person under the law; freedom from arbitrary interference with privacy, family and home in the United States; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly; and freedom of association.

43. Legal aliens enjoy equal protection rights as well. Distinctions between lawful permanent resident aliens and citizens require justification, but not the compelling state interests required for distinctions based on race. Consistent with article 25 of the Covenant, aliens are generally precluded from voting or holding federal elective office. A number of federal statutes, some of which are discussed above, prohibit discrimination on account of alienage and national origin.

44. Throughout the Immigration and Nationality Act, Congress distinguishes lawful permanent residents (LPRs) and non-

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LPRs. The federal courts have held that Congress may draw such distinctions consistently with the Equal Protection Clause of the Fifth Amendment so long as there is a facially legitimate and bona fide reason for treating the two classes disparately. *See, e.g., De Leon-Reynoso v. Ashcroft*, 293 F.3d 633 (3d Cir. 2002); *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001).

45. With the creation of the Department of Homeland Security (DHS) in 2003, Congress established an Officer for Civil Rights and Civil Liberties. The Officer is charged with reviewing and assessing information concerning abuses of civil rights, civil liberties, and discrimination on the basis of race, ethnicity and religion, by employees or officials of the Department of Homeland Security. The Officer has a unique internal function of assisting the senior leadership to develop policies and initiatives in ways that protect civil rights and civil liberties. The Officer conducts outreach activities to non-governmental organizations and others to communicate the Office's role and the Department's commitment to the protection of individual liberties. The DHS Office for Civil Rights and Civil Liberties has been actively working to develop relationships with the Arab-American and Muslim-American communities. Reaching out to immigrant communities is an important part of a dialogue to address concerns regarding racial, ethnic, and religious discrimination.

\* \* \* \*

### Article 3—Equal rights of men and women

60. Constitutional protections. As discussed in paragraphs 101–109 of the Initial Report, the rights enumerated in the Covenant and provided by U.S. law are guaranteed equally to men and women in the United States through the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments of the United States Constitution. These provisions prohibit both the federal government and the states from arbitrarily or irrationally discriminating on the basis of gender.

\* \* \* \*

62. [I]n *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court articulated the current standard for equal protection review of

gender distinctions. The justification for such distinctions must be “exceedingly persuasive.” *Id.* at 533. “The burden of justification is demanding and it rests entirely on the state. The state must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Id.*, (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Furthermore, “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

63. In *Nguyen v. INS*, 533 U.S. 53 (2001), the Supreme Court applied the *Virginia* standard to uphold a federal immigration statute that makes gender-based distinctions in the methods of establishing citizenship for a child born out-of-wedlock overseas where one parent is a U.S. citizen and the other is an alien. The statute, 8 U.S.C. § 1409(a), requires that certain steps be taken to document parenthood when the citizen-parent is the child’s father but not when the citizen-parent is the child’s mother. The Court found that the statute substantially serves the important governmental objectives of ensuring the existence of a biological relationship between the citizen-parent and the child, as the mother-child relationship is verifiable from the child’s birth. *Id.* at 62. The Court also reasoned that the statute ensures at least the opportunity for the development of ties between the child and the citizen-parent, and, in turn, the United States, as the very event of birth provides such an opportunity for the mother and child. *Id.* at 64-65. Because fathers and mothers are not similarly situated with regard to proof of parentage, the Court held that the gender-based distinctions in the statute were justified. *Id.* at 63, 73. The Court also noted that the additional requirements imposed upon fathers were “minimal” and that the statute did not impose “inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers[.]” *Id.* at 70-71.

64. On 23 June, 2000, Executive Order 13160 was issued prohibiting discrimination on the basis of a number of classifications, including sex, in federally-conducted education and training programs. 65 Fed. Reg. 39,775 (2000). This order applies to all feder-

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ally conducted education and training programs as a supplement to existing laws and regulations that already prohibit many forms of discrimination in both federally conducted and federally assisted educational programs.

65. Discrimination based on pregnancy. The Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k)(2004), amended Title VII of the Civil Rights Act of 1964 to provide that discrimination “on the basis of sex” includes discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions[.]” The PDA requires that pregnancy be treated the same as other physical or medical conditions.

\* \* \* \*

69. Prohibition of Sex Discrimination in Education. Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) is the principal federal law that prohibits sex discrimination in education programs or activities that receive federal financial assistance. Federal regulations and guidelines require and assist schools in addressing such issues as sexual harassment and nondiscrimination in admissions, financial assistance, course offerings, parental or marital status, and opportunities to participate in interscholastic and intercollegiate athletics. Each school or educational institution is required to designate an employee to coordinate its Title IX responsibilities, including investigating complaints alleging violations of Title IX.

70. Title IX is primarily enforced by the Department of Education’s Office for Civil Rights which investigates complaints, issues policy guidance, and provides technical assistance to schools (such as training, and sponsorship of and participation in civil rights conferences). Students and school employees may also bring private lawsuits against schools for violations of Title IX.

71. Furthermore, every federal agency that provides financial assistance to education programs is required to enforce Title IX. In August 2000, twenty federal agencies issued a final common rule for the enforcement of Title IX. In addition, Executive Order 13160, issued in June 2000, prohibits discrimination based on sex, race, color, national origin, disability, religion, age, sexual orientation, and status as a parent in education and training programs conducted by the federal government.

72. Prohibition of Discrimination in Education on the Basis of Pregnancy. The Title IX implementing regulation at 34 C.F.R. 106.40(a) specifically prohibits educational institutions that are recipients of federal financial assistance from applying any rule concerning a student's actual or potential parental, family, or marital status, which treats students differently on the basis of sex. [See also] . . . 34 C.F.R. 106.40(b)(1)-(4). . . .

\* \* \* \*

75. Sexual Harassment. Sexual harassment has been found to be a form of sex discrimination. Thus, federal statutes prohibiting discrimination on the basis of sex in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and in federally assisted education programs, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, also prohibit sexual harassment. In a series of decisions, the Supreme Court has established the principles underlying the application of these statutes to sexual harassment. First, it is clear that same-sex harassment is actionable, as long as the harassment is based upon sex. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). With respect to employment, where harassment by a supervisor results in a "tangible employment action" such as demotion, discharge, or undesirable reassignment, the employer is liable for a Title VII violation. Even if there has been no such tangible employment action by the employer, there may nonetheless be a Title VII violation if workplace harassment is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citations and internal quotation marks omitted). In such cases, however, an employer may avoid liability if it demonstrates that: 1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive opportunities provided by the employer or to avoid harm otherwise. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

76. With respect to education, educational institutions that receive federal financial assistance may be liable for damages in sexual

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harassment suits if school officials have actual notice of the harassment, and respond to that notice with deliberate indifference. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

\* \* \* \*

81. Violence Against Women. On 13 September, 1994, the U.S. Congress passed the Violence Against Women Act (VAWA), a comprehensive legislative package aimed at ending violence against women. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (2004).

\* \* \* \*

85. The Violence Against Women Act of 2000 (VAWA 2000), Pub. L. No. 106-386, 114 Stat. 1464, enacted on 28 October, 2000, and codified at 42 U.S.C. § 3796gg, continued and strengthened the federal government's commitment to helping communities change the way they respond to these crimes. VAWA 2000 reauthorized critical grant programs created by VAWA and subsequent legislation and established new programs such as initiatives addressing elder abuse, violence against women with disabilities, and supervised visitation with children in domestic violence cases. VAWA 2000 also strengthened the original law by improving protections for battered immigrants, sexual assault survivors, and victims of dating violence and creating a new federal cyberstalking crime.

86. The Office on Violence Against Women (OVW). This office, a component of the U.S. Department of Justice, was created in 1995. OVW implements VAWA and subsequent legislation and provides national leadership against domestic violence, sexual assault, and stalking. Since its inception, OVW has launched a multifaceted approach to responding to these crimes. In 2002, Congress passed the Violence Against Women Office Act (Pub.L. 107-273, Div. A, Title IV, Nov. 2, 2002, 116 Stat. 1789) which statutorily established the office. A description of the comprehensive programs to protect women from violence implemented by OVM, recent initiatives to protect women from what is referred to as "stalking", and other federal and state initiatives on this subject is provided in Annex II.



\* \* \* \*

Article 4—States of Emergency

89. Consistent with the information reported in paragraphs 110–127 of the Initial Report, since submission of that report, the United States has not declared a “state of emergency” within the meaning of Article 4 or otherwise imposed emergency rule by the executive branch.

90. However, as reported in that section of the Initial Report, there are statutory grants of emergency powers to the President. Since the submission of the Initial Report, the President has invoked the National Emergencies Act, 50 U.S.C. § 1601 et seq., to declare a national emergency in the following situations:

In 2001, the President of the United States issued a number of executive orders after the September 11 terrorist attacks that declared a national emergency as a result of those attacks pursuant to the National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2005).

91. This invocation was misinterpreted by the (OSCE) as action which required derogation under Article 4 of the Covenant. In correspondence with the OSCE, the United States explained that under U.S. law, declarations of national emergency have been used frequently, in both times of war and times of peace, in order to implement special legal authorities and that the Executive Orders made as a result of the September 11 attacks did not require derogation from its commitments under the Covenant.

92. Judicial review. There have been no adverse federal judicial rulings concerning the exercise of emergency powers by the federal authorities since the submission of the Initial Report.

93. In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court stated that the United States is entitled to detain enemy combatants, even American citizens, until the end of hostilities, in order to prevent the enemy combatants from returning to the field of battle and again taking up arms. The Court recognized the detention of such individuals is such a fundamental and accepted incident of war that it is part of the “necessary and appropriate” force that Congress authorized the President to use against nations, organiza-

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tions, or persons associated with the September 11 terrorist attacks. 124 S.Ct. at 2639-42 (plurality op.); *id.*, at 2679 (Thomas J., dissenting). A plurality of the Court addressed the entitlements of a U.S. citizen designated as an enemy combatant and held that the Due Process Clause of the United States Constitution requires “notice of the factual basis for [the citizen-detainee’s] classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker.” *Id.* at 2648. A plurality of the Court observed: “There remains the possibility that the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal,” and proffered as a benchmark for comparison the regulations titled, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997). *Id.* at 2651.

94. On 28 February, 2005, a federal district court held that the Non-Detention Act, 18 U.S.C. § 4001(a), forbids the federal government from detaining Jose Padilla as an “enemy combatant” and that the President lacks any inherent constitutional authority to detain Padilla. *See Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 (D.S.C. Feb. 2005). In September of 2005, the district court’s decision was reversed by the Fourth Circuit. 2005 U.S. App. LEXIS 19465 (4th Cir. 2005). The Fourth Circuit held that the United States Congress in the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, provided the President all powers “necessary and appropriate to protect American citizens from terrorist acts by those who attacked the U.S. on September 11, 2001.” *Id.* at \*30. Those powers included the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, took up arms against the United States in its war against these enemies, a power without which the President could well be unable to protect American citizens. *Id.* at \*31.

\* \* \* \*

Article 6—Right to life

96. Right to life, freedom from arbitrary deprivation. The United States constitutional recognition of every human’s inherent

right to life and the doctrine that that right shall be protected by law were explained in paragraphs 131–148 of the Initial Report.

97. In addition, the Born-Alive Infants Protection Act of 2002, which was signed into federal law on 5 August, 2002, makes it clear that “every infant member of the species homo sapiens who is born alive at any stage of development” is considered a “person”, “human being”, and “individual” under federal law. See 1 U.S.C. § 8. This is true regardless of the nature of the birth, and whether the live birth resulted from a failed abortion procedure. *Id.*

98. Congress also enacted the Unborn Victims of Violence Act of 2004 “to protect unborn children from assault and murder.” See Pub. L. No. 108-212. Federal law now provides that whoever, in the course of committing certain federal crimes, “causes the death of . . . a child, who is in utero at the time the conduct take[s] place,” is guilty of a separate offense and shall be punished as if that death had occurred to the unborn child’s mother. See 18 U.S.C. § 1841(a). If the person engaging in such conduct intentionally kills the unborn child, he will be punished for intentionally killing a human being. See 18 U.S.C. § 1841(a)(2)(C). This law does not, however, authorize the prosecution of any woman with respect to her unborn child, see 18 U.S.C. § 1841(c)(3), nor does it criminalize “conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law.” See 18 U.S.C. § 1841(c)(1).

99. Assisted suicide. In recent years, debate has intensified in the United States over the question of whether terminally ill people should have the legal right to obtain a doctor’s help in ending their lives. The campaign to legalize assisted suicide, also called the right-to-die movement, has been under way since the 1970s but became prominent in the 1990s, at least partly because of the actions of Dr. Jack Kevorkian, a retired Michigan pathologist. Kevorkian helped at least 50 people to die since 1990. In 1999, a Michigan jury convicted Kevorkian of second-degree murder and he is currently serving a 10 to 25 year prison sentence.

100. In November 1994, Oregon became the first state to make assisted suicide legal. Its law, passed by a slim margin in a voter referendum, allows doctors to prescribe a lethal dose of drugs to

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terminally ill patients who meet certain criteria. In June 1997, the Supreme Court upheld two state laws that barred assisted suicide. See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997). While finding that states could make assisted suicide illegal, the court also made it clear that states could legalize assisted suicide if they so chose. The debate over assisted suicide continues in the United States. Legislation legalizing the practice has been introduced in a number of states. However, physician-assisted suicide remains illegal in every state except Oregon.

101. The Attorney General has determined that assisting suicide is not a legitimate medical purpose and therefore that the Controlled Substances Act of 1970 (“CSA”), 21 U.S.C. § 801, bars physicians from prescribing federally-controlled substances to assist in a suicide. The validity of the Attorney General’s determination is the subject of litigation and is scheduled for decision by the Supreme Court during the October Term 2005. See *Gonzales v. Oregon*, 125 S.Ct. 1299 (2005).\*

102. The Supreme Court has recognized that a state has “legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.” See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). Accordingly, it has held that “subsequent to viability, the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id.* at 879. At the same time, the Supreme Court has held that a state may not place an “undue burden” on a woman’s ability to abort a pregnancy prior to viability, and has invalidated some legislative efforts to protect an unborn child’s right to life on this ground. See e.g., *Casey*, 505 U.S. 833; *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a state-law ban on a procedure known as “partial birth abortion,” because it failed to allow an exception for

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\* Editor’s Note: In *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), the Supreme Court concluded that “the CSA’s prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.”

the mother's health, and because the vagueness of the statute's definition of the procedure it prohibited had the effect of placing an "undue burden" on a woman's ability to obtain abortion by prohibiting certain common methods of abortion).

103. In 2003, Congress enacted a federal prohibition on partial-birth abortion, finding that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." See Pub. L. No. 108-105 at § 2(14)(M). This statute includes a more precise definition of the procedure it prohibits. In addition, the statute contains a congressional finding that "partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care." See Pub. L. No. 108-105 at § 2(13). The validity of this statute is currently the subject of litigation.

104. Capital Punishment. The federal government and 38 states impose capital punishment for crimes of murder or felony murder, and generally only when aggravating circumstances were present in the commission of the crime, such as multiple victims, rape of the victim, or murder-for-hire.

105. Criminal defendants in the United States, especially those in potential capital cases, enjoy many procedural guarantees, which are well respected and enforced by the courts. These include: the right to a fair hearing by an independent tribunal; the presumption of innocence; the minimum guarantees for the defense; the right against self-incrimination; the right to access all evidence used against the defendant; the right to challenge and seek exclusion of evidence; the right to review by a higher tribunal, often with a publicly funded lawyer; the right to trial by jury; and the right to challenge the makeup of the jury, among others.

106. In two major decisions . . . , the Supreme Court cut back on the categories of defendants against whom the death penalty may be applied. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the Court held that the execution of persons who were under the age of eighteen when their capital crimes were committed violates the

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Eighth and Fourteenth Amendments.\* In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the execution of mentally retarded criminal defendants was cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. The Supreme Court has repeatedly refused to consider the contention that a long delay between conviction and execution constitutes cruel and unusual punishment under the Eighth Amendment. See, e.g., *Foster v. Florida*, 537 U.S. 990 (2002). Also, the lower federal courts and state courts have consistently rejected such a claim. See, e.g., *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 461 (1999) (THOMAS, J., concurring in denial of certiorari).

107. Federal Death Penalty. The following three federal capital defendants have been executed since the enactment of the current federal death penalty statutes: [Timothy McVeigh, Juan Raul Garza, and Louis Jones].

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110. Capital Punishment and Consular Notification. Since the initial report, a number of foreign nationals who were tried and sentenced to death by one of the states of the United States have sought to have their convictions or sentences overturned based upon the arresting authorities' failure to provide timely consular notification to the foreign national as required under the Vienna Convention on Consular Relations (VCCR). Paraguay, Germany, and Mexico each brought suit against the United States in the International Court of Justice (ICJ) under the Optional Protocol to the VCCR, asking the court, inter alia, to order the United States to provide new trials and sentencing hearings to foreign nationals when the competent authorities in the United States had failed to provide consular notification as required under the VCCR. See *Vienna Convention on Consular Relations* (Paraguay v. U.S.), 1998; *LaGrand* (Germany v. U.S.), 2001; *Avena and Other Mexican Nationals* (Mexico v. U.S.).\*\*

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\* Editor's note: See discussion in H.1. below.

\*\* Editor's note: See discussion in Chapter 2.A.1.

115. Victims of Crime. The Office for Victims of Crime (OVC) in the Department of Justice administers programs authorized by the Victims of Crime Act of 1984, in addition to the Crime Victims Fund (the Fund) also authorized by the same statute. . . .

116. In 2003, Congress passed the Justice for All Act, which sets out the following rights of victims of federal crimes: The right to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the reasonable right to confer with the attorney for the government in the case; the right to full and timely restitution as provided in law; the right to proceedings free from unreasonable delay; the right to be treated with fairness and with respect for the victim's dignity and privacy.

117. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime are required to make their best efforts to see that crime victims are notified of, and accorded, these rights.

118. In order to enforce these rights, the crime victim, the crime victim's lawful representative, or the government prosecutor may assert the rights in a federal court. . . .

119. In terms of immigration, DHS may grant relief in the form of "U" visas to victims of crimes of violence who have aided in the investigation or prosecution of the perpetrators of violent crime. See Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. 106-386, 114 Stat. 1464 (Oct. 28 2000), Division B, the Violence Against Women Act of 2000 (VAWA). The U visa may be available to a person who suffered substantial physical or mental abuse as a result of having been a victim of a serious crime, including rape, torture, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage (debtors bound in servitude to



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creditors), involuntary servitude, slave trade; kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, or perjury. *See* INA § 101(a) (15)(U); *See also* VTVPA § 1513(b)(3). The U visa implementing regulations have not yet been promulgated. DHS is holding possible U visa cases pending publication of the implementing rule and providing interim employment authorization to applicants who establish *prima facie* eligibility.

120. Victim Assistance. Each year, all 50 states, the District of Columbia and various U.S. territories are awarded OVC funds to support community-based organizations that serve crime victims. . . .

121. Victim Compensation. All 50 states, the District of Columbia, Puerto Rico and Guam, have established compensation programs for crime victims. . . .

122. Victims of International Terrorism. In addition, the Victims of Crime Act (VOCA) (42 U.S.C. § 10603c) authorizes the OVC Director to establish an International Terrorism Victim Expense Reimbursement Program to compensate eligible “direct” victims of acts of international terrorism that occur outside the United States, for expenses associated with that victimization.

123. Victims of Trafficking. Victims who are considered to have been subjected to a severe form of trafficking, and who agree to assist law enforcement in the investigation of trafficking, may be eligible for immigration relief, including “continued presence” and the T-visa. These are self-petitioning visas, under the TVPA. If granted, a T-visa provides the alien with temporary permission to reside in the United States and may lead to legal resident status. The victim also receives an authorization permit to work in the United States.

124. The Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) processes T-visas; the Department of Homeland Security Immigration and Customs Enforcement (ICE) processes continued presence requests. All victims of trafficking are eligible for victim services upon their identification by federal law enforcement. The types of services available depend on: (1) whether a determination has been made that the victim meets the definition of having been subjected to a severe form of trafficking set out in the TVPA; (2) the victim’s immigration status;



and (3) the victim's willingness to assist with an investigation and prosecution. To be eligible for services, minor victims need not demonstrate a willingness to assist law enforcement in an investigation nor are they required to have continued presence status. The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 mandated new information campaigns to combat sex tourism, added some refinements to the federal criminal law, and created a new civil action provision that allows trafficking victims to sue their traffickers in federal district courts. The TVPRA provides enhanced protection for victims of trafficking and assistance to family members of victims, including elimination of the requirement that a victim of trafficking between the ages of 15 and 18 must cooperate with the investigation and prosecution of his or her trafficker in order to be eligible for a T-visa, and making benefits and services available to victims of trafficking also available for their family members legally entitled to join them in the United States.

125. Victims of Trafficking Discretionary Grant Program. OVC also administers the Services for Trafficking Victims Discretionary Grant Program, which was authorized under the Trafficking Victims Protection Act of 2000. . . . The TVPA created a mechanism for allowing non-citizens who were trafficking victims access to benefits and services from which they might otherwise be barred. . . .

Article 7—Freedom from torture, or cruel, inhuman or degrading treatment or punishment\*

\* \* \* \*

129. Committee Request. In its letter of 27 July 2004, the Human Rights Committee requested, inter alia, that the United States should address: problems relating to the legal status and treatment of persons detained in Afghanistan, Guantanamo, Iraq and other places of detention outside the United States of America (art. 7, 9, 10, and 14 of the Covenant).

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\* Editor's note: See discussion of Report to the UN Committee Against Torture in section E.1. below.

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130. The United States recalls its longstanding position that it has reiterated in paragraph 3 of this report and explained in detail in the legal analysis provided in Annex I; namely, that the obligations assumed by the United States under the Covenant apply only within the territory of the United States. In that regard, the United States respectfully submits that this Committee request for information is outside the purview of the Committee. The United States also notes that the legal status and treatment of such persons is governed by the law of war. Nonetheless, as a courtesy, the United States is providing the Committee pertinent material in the form of an updated Annex to the U.S. report on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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133. Basic rights of prisoners. Complaints about failure by individual law enforcement officers to comply with procedural rights continue to be made to federal and state authorities. The Criminal Section of the Civil Rights Division of the United States Department of Justice is charged with reviewing such complaints made to the federal government and ensuring the vigorous enforcement of the applicable federal criminal civil rights statutes. There have been fewer allegations of violation of procedural rights than physical abuse allegations.

134. Civil Pattern or Practice Enforcement. The Civil Rights Division of the U.S. Department of Justice may institute civil actions for equitable and declaratory relief pursuant to the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, 42 U.S.C. § 14141, which prohibits law enforcement agencies from engaging in a pattern or practice of violating people's civil rights. Since October of 1999, the Civil Rights Division has negotiated 16 settlements with law enforcement agencies. These settlements include two consent decrees regarding the Detroit, Michigan Police Department, and consent decrees covering Prince George's County, Maryland and Los Angeles, California police departments. Other recent settlements include those entered into with police departments in the District of Columbia; Cincinnati, Ohio; Buffalo, New York; Villa Rica, Georgia; and Cleveland, Ohio. There are currently 13 ongoing investigations of law enforcement agencies.

135. Civil Rights of Institutionalized Persons Act (CRIPA). The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et seq., permits the Attorney General to institute civil lawsuits against state institutions regarding the civil rights of their residents, including the conditions of their confinement and use of excessive force. The Civil Rights Division of the Department of Justice has utilized this statute to prosecute allegations of torture and cruel, inhuman, and degrading treatment or punishment. . . .

136. Prisoner Litigation. The Civil Rights Division investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or Section 14141, described above. These statutes allow suit for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement. . . .

137. Sexual abuse in prison. The Prison Rape Elimination Act of 2003 (PREA) was enacted to address the problem of sexual assault of persons in the custody of U.S. correctional agencies. The Act, signed into law on 4 September, 2003, applies to all public and private institutions that house adult or juvenile offenders and is also relevant to community-based agencies. . . .

138. Illustrative of the problem of sexual abuse in correctional facilities are *United States v. Arizona* and *United States v. Michigan*, both cases filed under CRIPA in 1997 and dismissed in 1999 and 2000 respectively; the Civil Rights Division sought to remedy a pattern or practice of sexual misconduct against female inmates by male staff, including sexual contact and unconstitutional invasions of privacy. The cases were dismissed after the state prisons agreed to make significant changes in conditions of confinement for female inmates.

139. Segregation of Prisoners. In *Sandin v. Conner*, 515 U.S. 472 (1995), the Supreme Court defined the due process requirements for prisoners subjected to segregation for disciplinary reasons. The Court held that a 30 day period of disciplinary segregation from general population did not give rise to a liberty interest that would require a full due process hearing prior to the imposition of the punishment. The Court did leave open the possi-

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bility that due process protections would be implicated if the confinement was “atypical and significant.”

140. Psychiatric hospitals. As reported in paragraphs 172–173 of the Initial Report, individuals with mental illness may be admitted to psychiatric hospitals either through involuntary or voluntary commitment procedures for the purpose of receiving mental health services. Institutionalized persons, including mental patients, are entitled to adequate food, clothing, shelter, medical care, reasonable safety, and freedom from undue bodily restraint. Complaints tend to focus on inadequate conditions of confinement. Since enactment of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, et seq., in 1980, some 400 facilities, including psychiatric facilities, prisons, jails, juvenile facilities, nursing homes, and facilities housing persons with developmental disabilities have been investigated by the U.S. Department of Justice and relief sought, as appropriate. Also, the 1999 U.S. Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), held that unnecessary segregation of people with disabilities in institutions may be a form of discrimination that violates the 1990 Americans with Disabilities Act, when considering all relevant factors including the cost of a less restrictive environment. In addition, the Protection and Advocacy for Individuals with Mental Illness program, enacted in 1986, protects and advocates for the rights of people with mental illnesses and investigates reports of abuse and neglect in facilities that care for or treat individuals with mental illnesses. Patients are also afforded protections under Medicare and Medicaid “Conditions of Participation on Patients’ Rights” and the Children’s Health Act of 2001 related to use of seclusion and restraint.

141. Medical or scientific experimentation. The United States Constitution protects individuals against non-consensual experimentation. Specifically included are the Fourth Amendment’s proscription against unreasonable searches and seizures (including seizing a person’s body), the Fifth Amendment’s proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment’s proscription against the infliction of cruel and unusual punishment. In addition, legislation provides similar guarantees (*See* 21 U.S.C. §§ 355(i)(4) & 3360j(g)(3)(D)).

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144. The Fourth, Fifth, and Eighth Amendments to the United States Constitution, by statutes, and by agency rules and regulations promulgated in response to such provisions, prohibit experimentation on prisoners. As a general matter, in the United States, “[e]very human being of adult years or sound mind has a right to determine what shall be done with his own body.” See *Schloendorff v. Society of New York Hospitals*, 105 N.E. 92, 93 (1914). Accordingly, prisoners are almost always free to consent to any regular medical or surgical procedure for treatment of their medical conditions. Consent must be “informed”: the inmate must be informed of the risks of the treatment; must be made aware of alternatives to the treatment; and must be mentally competent to make the decision. Because of possible “coercive factors, some blatant and some subtle, in the prison milieu,” (James J. Gobert and Neil P. Cohen, *Rights of Prisoners*, New York: McGraw Hill, Inc., 1981, pp. 350-51) prison regulations generally do not permit inmates to participate in medical and scientific research.

145. The U.S. Federal Bureau of Prisons prohibits medical experimentation or pharmaceutical testing of any type on all inmates in the custody of the U.S. Attorney General who are assigned to the Bureau of Prisons. 28 C.F.R. § 512.11(c).

146. Moreover, the federal government strictly regulates itself when conducting, or funding research in prison settings. HHS, which sponsors over 90 percent of federally conducted or supported human research promulgated in 1976 regulations (45 C.F.R. § 46 (c)) that protect the rights and welfare of prisoners involved in research. . . .

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#### Article 14—Right to fair trial

271. Competent, independent and impartial tribunal. States may set appropriate standards of conduct for their judges. See *Gruenburg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976). The Supreme Court has held, however, that a state canon of judicial conduct that prohibits candidates for judicial elections from announcing their views on disputed political or legal issues vi-

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olates the First Amendment. See *Republican Party v. White*, 536 U.S. 765 (2002).

272. Trial by jury. The right to trial by jury reflects “a profound judgment about the way in which law should be enforced and justice administered”. See *Duncan v. Louisiana*, 391 U.S. at 155. In the U.S. system, the jury is the fact-finder. Therefore, a judge may not direct the jury to return a verdict of guilty, no matter how strong the proof of guilt may be. See *Sparf and Hansen v. United States*, 156 U.S. 51, 105-6 (1895). A criminal defendant is entitled to a jury determination beyond a reasonable doubt of every element of the crime with which he is charged, as well as any fact (other than the fact of a prior conviction) that increases the statutory maximum penalty for the offense. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). See also, *Blakely v. Washington*, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

273. Civil cases. Guarantees of fairness and openness also are ensured in the civil context, with federal and state constitutions providing basic and essential protections. In civil disputes, the fundamental features of the United States judicial system—an independent judiciary and bar, due process and equal protection of the law—are common. Most importantly, the Due Process and Equal Protection Clauses of the Constitution—applicable to the states through the Fourteenth Amendment—mandate that judicial decision-making be fair, impartial, and devoid of discrimination. Neutrality is the core value.

274. Neutrality means the absence of discrimination. As is the case with criminal trials, the Equal Protection Clause bars the use of discriminatory stereotypes in the selection of the jury in civil cases. As the Supreme Court held in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991): “Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.” In *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), the Court extended this principle to cases involving gender-based exclusion of jurors, holding that “gender, like race, is an unconstitutional proxy for juror competence and impartiality.” As the Court explained (*id.* at 146): “When persons are excluded from

participation in our democratic processes solely because of race or gender, . . . the integrity of our judicial system is jeopardized.”

275. Fairness of civil proceedings also is ensured by the requirement that where they might result in serious “hardship” to a party adversary hearings must be provided. For instance, where a dispute between a creditor and debtor runs the risk of resulting in repossession, the Supreme Court has concluded that debtors should be afforded a fair adversarial hearing. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also, Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

276. This is particularly true in civil cases involving governmental action, where the Supreme Court, since the 1970s, has recognized the importance of granting procedural rights to individuals. In determining whether procedures are constitutionally adequate, the Court weighs the strength of the private interest, the adequacy of the existing procedures, the probable value of other safeguards, and the government’s interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Depending on these factors, the United States Constitution mandates different types of guarantees in civil proceedings involving the government. Basic requirements include an unbiased tribunal; notice to the private party of the proposed action; and the right to receive written findings from the decision maker. Applying these principles, the Court has thus held that persons have had a right to notice of the detrimental action, and a right to be heard by the decision maker. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1918) (“The fundamental requisite of due process of law is the opportunity to be heard”); *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare entitlements cannot be interrupted without a prior evidentiary hearing). In the context of civil forfeiture proceedings, the Court has held that citizens have a Due Process right to a hearing to oppose the forfeiture of their property. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48-62 (1993). And in *Degen v. United States*, 517 U.S. 820 (1996), the Court ruled that this right to a hearing applies even when the citizen is a fugitive who refuses to return in person to this country to face criminal charges. When action is taken by a government agency, statutory law embodied in the Administrative Procedure Act also imposes requirements on the government, such as the impartiality of the decision maker and the party’s right to judicial review of ad-



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verse action. As Justice Frankfurter once wrote, the “validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951).

277. Although inequalities in wealth distribution certainly have an impact on individuals’ access to the courts and to representation, the equal protection components of state and federal constitutions have helped smooth these differences. In particular, the Supreme Court has held that access to judicial proceedings cannot depend on one’s ability to pay where such proceedings are “the only effective means of resolving the dispute at hand”. *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971) (holding unconstitutional a state law conditioning a judicial decree of divorce upon the claimant’s ability to pay court fees and costs). *See also*, *M.L.B. v. S.L.J.*, 519 U.S. 201 (1996) (holding unconstitutional a state law conditioning a parent’s right to appeal from a trial court’s decree terminating her parental rights on her ability to pay record preparation fees).

278. Inequalities remain, though, in part because neither the Constitution nor federal statutes provide a right to appointed counsel in civil cases. Nonetheless, the Supreme Court has made it easier for indigent parties to afford legal representation by invalidating prohibitions against concerted legal action. The Court has thus recognized a right for groups to “unite to assert their legal rights as effectively and economically as practicable”. *See United Trans. Union v. State Bar of Michigan*, 401 U.S. 576, 580 (1971). In addition, Congress long ago enacted the “federal in forma pauperis statute . . . to ensure that indigent litigants have meaningful access to the federal courts.” *See Neitzke v. Williams*, 490 U.S. 319, 324 (1989). And in the past 40 years, Congress has enacted an increasing number of fee-shifting statutes—such as the Civil Rights Attorneys Fees Awards Act in 1976 and the Equal Access to Justice Act in 1980—that enable prevailing parties in certain kinds of cases



to recoup all or part of their attorney's fees and expenses from the losing parties.

Rights of the accused

279. Right to prepare defense and to communicate with counsel. Defendants retained in custody acquire their Sixth Amendment right to counsel when formal adversarial judicial proceedings are initiated against them. *See Brewer v. Williams*, 430 U.S. 387, 398 (1977). A suspect's invocation of the right to counsel is specific to the charged offense and does not also invoke the right to counsel for later interrogation concerning another factually related offense, unless the two offenses would be deemed the same for double jeopardy purposes. *See Texas v. Cobb*, 532 U.S. 162, 173 (2001). In a landmark decision, the Supreme Court held that the admission of out-of-court testimonial statements violates the Sixth Amendment's Confrontation Clause unless those witnesses are unavailable for trial and the defendant has had an opportunity to cross-examine those witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004).

280. The Sixth Amendment also guarantees a defendant the right to counsel. Although there is no right to appointment of counsel for misdemeanor offenses where no sentence of actual imprisonment is imposed, a suspended sentence may not be activated based upon a defendant's violation of the terms of probation where he was not provided with counsel during the prosecution of the offense for which he received a sentence of probation. *Alabama v. Shelton*, 535 U.S. 654 (2002).

281. Right to legal assistance of own choosing. The right to counsel in all federal criminal prosecutions is provided for by the Sixth Amendment. This right has been extended to state courts through operation of the Due Process Clause of the Fourteenth Amendment. In the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court mandated that every indigent person accused of a felony in a state court must be provided with counsel. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Supreme Court extended this rule to provide for the appointment of counsel to indigent persons charged with any offense, including misdemeanors, which could result in incarceration. In addition, a defendant may not be sentenced to imprisonment based upon his

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violation of the terms of probation previously imposed for a misdemeanor offense, if he was not provided with counsel during the prosecution of the misdemeanor offense. *See Alabama v. Shelton*, 535 U.S. 654 (2002).

282. Protection against self-incrimination. The Fifth Amendment provides that “No person shall be . . . compelled in any criminal case to be a witness against himself.” This constitutional protection of the individual’s right against self-incrimination in criminal cases is applicable to the states as well as the federal government.

283. The Fifth Amendment thus prohibits the use of involuntary statements. It not only bars the government from calling the defendant as a witness at his trial, but also from taking statements from the accused against the accused’s will. If a defendant confesses, he may seek to exclude the confession from trial by alleging that it was involuntary. The court will conduct a factual inquiry into the circumstances surrounding the confession to determine if the law enforcement officers acted in a way to pressure or coerce the defendant into confessing and, if so, whether the defendant lacked a capacity to resist the pressure. *See Colorado v. Connelly*, 479 U.S. 157 (1986). Physical coercion will render a confession involuntary. *See Brown v. Mississippi*, 297 U.S. 278 (1936).

284. An individual’s right against compelled self-incrimination applies regardless of whether charges have been formally filed. To ensure that the individual has knowingly waived Fifth Amendment rights when he gives a statement during questioning by government agents, the investigating officer conducting a custodial interrogation is obligated to inform the suspect that the suspect has a right to remain silent, that anything he says can be used against him, and that the suspect has a right to speak with an attorney before answering questions. *See Miranda v. Arizona*, 384 U.S. 436 (1966). *See Dickerson v. United States*, 530 U.S. 428, 444 (2000) (“Miranda announced a constitutional rule” that cannot be overruled by congressional enactment).

285. Review of conviction and sentence. Individuals who allege their convictions or punishments are in violation of federal law or the Constitution may seek review in federal court by way of an application for a writ of habeas corpus. *See, e.g., Ex parte Bollman*, 8 U.S. 74, 95 (1807); *Stone v. Powell*, 428 U.S. 465, 474-75 n.6

(1976); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). State prisoners in custody may seek federal court review on the ground that they are in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§2241, 2254. The prisoner seeking federal review must first exhaust all state appellate remedies. 28 U.S.C. § 2254 (b),(c). Federal courts have imposed limitations on the types of issues that can be raised in habeas corpus applications as well as procedural requirements for raising those issues, largely out of respect for the states' interest in the finality of their criminal convictions. See *Coleman v. Thompson*, 501 U.S. 722 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Teague v. Lane*, 489 U.S. 288 (1989). In 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA) that modified the habeas corpus statutes by codifying many of the judicially-created limitations. See 110 Stat. 1214 (effective April 24, 1996).

286. Double jeopardy protections for defendants. The government's *Petite* policy is set out in the United States Attorney's Manual § 9-2.031 (2000). The policy precludes federal prosecution of a defendant after he has been prosecuted by state or federal authorities for "substantially the same act[s] or transaction[s]," unless three requirements are satisfied. First, the case must involve a "substantial federal interest." Second, the "prior prosecution must have left that interest demonstrably unvindicated." The policy notes that this requirement may be met when the defendant was not convicted in the prior proceeding because of "incompetence, corruption, intimidation, or undue influence," "court or jury nullification in clear disregard of the law," or "the unavailability of significant evidence," or when the sentence imposed in the prior proceeding was "manifestly inadequate in light of the federal interest involved." Prosecutions that fall within the *Petite* policy must be approved in advance by an Assistant Attorney General. In *Smith v. Massachusetts*, 125 S. Ct. 1129 (2005), the Supreme Court held that a judge's ruling during a trial that charges should be dismissed for lack of evidence constituted a "judgment of acquittal," which could not be revisited by that judge or any other under the Double Jeopardy Clause.

287. Procedure in the case of juvenile persons. Historically, confidentiality was one of the special aspects of juvenile proceedings and the proceedings and records were generally closed to the

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public and press. More recently, states have modified or removed traditional confidentiality provisions, making records and proceedings more open.

288. All states and the federal criminal justice system allow juveniles to be tried as adults in criminal court under certain circumstances. In some states, a prosecutor has discretion over whether to bring a case in criminal or juvenile court. Some state laws also provide for automatic prosecution in criminal court for serious offenses, repeat offenders, or routine traffic citations. A juvenile who is subject to the adult criminal justice system is entitled to the constitutional and statutory rights and protections provided for adults.

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### Article 25—Access to the political system

397. The U.S. political system is open to all adult citizens without distinction as to gender, race, color, ethnicity, wealth or property. The right to vote is the principal mechanism for participating in the U.S. political system. The requirements for suffrage are determined primarily by state law, subject to limitations of the Constitution and other federal laws that guarantee the right to vote. Over the course of the nation's history, various amendments to the Constitution have marked the process toward universal suffrage. In particular, the Supreme Court's interpretations of the Equal Protection Clause of the Fourteenth Amendment have expanded voting rights in a number of areas.

398. The Presidential election in 2000 saw an extremely close contest, with President George W. Bush winning the state of Florida by fewer than 1,000 votes. The contesting of the result raised some allegations of voting irregularities. However, subsequent investigations by the United States Department of Justice revealed no evidence in support of these allegations, nor any violations of federal voting rights violations that affected the outcome of the election.

399. The administration of elections in the United States is very decentralized, and is entrusted primarily to local governments. However, in 2002, Congress enacted the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545, which provides funds for the purchase of new voting equipment, to assist in the administration of federal elections, and to establish minimum federal election ad-

ministration standards. These new requirements include provisional balloting, identification for new voters, voter education, voting equipment for disabled voters, and statewide computerized voter registration lists.

400. The United States invited the Organization for Security and Co-operation in Europe (OSCE) to observe the 2004 presidential election, as it has done for every presidential and midterm election in the United States since 1996. The U.S. invitation was issued in accordance with the commitment the United States undertook with 54 other OSCE participating States in the 1990 Copenhagen Document. Following the invitation, the OSCE deployed an Election Observation Mission (EOM) on 4 October, 2004.

401. The EOM was a joint effort of the OSCE Office for Democratic Institutions and Human Rights and the OSCE Parliamentary Assembly focusing on specific issues including those related to the implementation of the Help America Vote Act in the framework of the presidential and congressional elections.

402. Although all of the new HAVA requirements were not yet effective in 2004, the presidential election was conducted successfully with minimal problems. In support of federal election laws, the Department of Justice mounted its largest ever election-monitoring effort, ultimately deploying 1,996 federal observers to 163 elections in 29 states. While advocates again raised some allegations of voting rights violations, investigation by the Department of Justice found no evidence to support these claims. In fact, the turnout of the voting age population was the highest in more than 35 years, since the 1968 presidential election. Turnout increased by nearly 17 million votes from the 2000 election and there were nearly 13 million new voters, an increase of 8 percent in voter registration. Long lines in some precincts resulted from the unprecedented increase in turnout, a reflection of increased citizen interest in participating in the election process.

403. The OSCE raised some complaints of limited access for its observers. However, these complaints misunderstand United States election laws. As noted, elections, including the admission of observers to polling places, are largely subject to state, and not federal law. The federal government lacks general authority to admit observers into polling places. At the same time, however, US elections

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are extremely transparent, and every state allows representatives of political parties and candidates to observe every step of the voting and balloting counting process. But, state and local authorities determine whether to grant permission to outside observers, particularly those who have no stake in the election process, to observe elections. The U.S. Department of State is committed to facilitating OSCE observation of elections in the United States and looks forward to improved coordination in the future.

404. Ultimately, the OSCE's final report found that the November 2nd elections were conducted in an environment that reflects a long democratic tradition, including institutions governed by rule of law, free and professional media and civil society involved in all aspects of the election process.

405. In the presidential race in particular, the mission found that there was exceptional public interest not only in the two main presidential candidates and respective campaign issues, but also in the election process itself with civil society substantially contributing towards awareness of election issues and voter participation.

406. The final report did, however, note several issues. Included among these were inconsistencies among election standards, possible conflicts of interest arising from the way in which election officials are appointed, allegations of electoral fraud and voter suppression in the pre-election period, limited access to observers in some jurisdictions, and long lines on election day.

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### III. Committee Suggestions and Recommendations

447. The Committee recommended that the United States review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to Article 6, paragraph 5, and Article 7 of the Covenant.

448. Comment: The United States has reviewed its reservations, declarations and understandings to the Covenant, and concluded that they are appropriate. With reference to Article 6(5) and Article (7) of the Covenant, the United States notes that its reservations are founded in United States constitutional principles. In that regard, with respect to Article 6(5), the United States also notes

that, since its Initial Report, the Supreme Court has ruled that the execution of offenders who were under 18 years of age at the time of their offense is prohibited by the United States Constitution. *See Roper v. Simmons*, 125 S. Ct. 1183 (2005).

449. The Committee hopes that the government of the United States will consider becoming a Party to the First Optional Protocol to the Covenant.

450. Comment: The United States has considered this issue and has no current intention of becoming a Party to the First Optional Protocol to the Covenant.

451. The Committee recommends that appropriate inter-federal and state institutional mechanisms be established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the Covenant, including its reporting obligations.

452. Comment: The United States has considered this issue, and on December 18, 1998, the President issued Executive Order 13107 regarding the implementation of human rights treaties. This order declares, *inter alia*, that it “shall be the policy and practice of the government of the United States, . . . fully to implement its obligations under the international human rights treaties to which it is a Party and that all executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.”

453. The order further establishes an Interagency Working Group on Human Rights Treaties “for the purpose of providing guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters. The principal functions of this group include, *inter alia*, (i) coordinating the preparation of reports that are to be submitted by the United States in fulfillment of its international human rights treaty obligations, (ii) coordinating responses to complaints submitted to the United Nations, the Organization of American States, and other international organizations alleging human rights violations by the United States, and (iii) developing effective mechanisms to review legislation proposed by



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the Administration for conformity with international human rights obligations and that these obligations are taken into account in reviewing legislation under consideration by the Congress. Consistent with the order, a variety of inter-agency procedures now exist to ensure that the matters addressed by the order are coordinated among all relevant agencies.

454. With respect to complying with its reporting obligations on a timelier basis, since the fall of 2003, the Department of State has more than doubled the resources it has dedicated to the purpose of completing such reports. The United States government is committed to submitting timely treaty reports.

455. The Committee emphasizes the need for the government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination Articles of the Covenant should be brought systematically into line with them as soon as possible.

456. Comment: The United States agrees that efforts to prevent and eliminate public and private discrimination consistent with our Constitution are of the utmost importance. The Civil Rights Division of the Department of Justice, the independent Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor, and the Office for Civil Rights of the U.S. Department of Education, among others, vigorously enforce anti-discrimination laws, including, among others, the Civil Rights Act of 1964, the Voting Rights Act of 1965, Executive Order 11246, Title IX of the Education Amendments, the Americans with Disabilities Act of 1992, and the Help America Vote Act of 2002.

457. At the same time, the United States government believes that discriminatory attitudes and prejudices are best fought by promoting equal access and individual merit as the guiding forces behind opportunity and advancement in society. The United States Supreme Court has interpreted the United States Constitution's equal protection principle to be incongruent with fostering racial or gender preferences and classifications except in the most



compelling circumstances. See *Gutter v. Bollinger*, 539 U.S. 309 (2003); *United States v. Virginia*, 518 U.S. 515, 531 (1996). Under U.S. law, vague and amorphous allusions to societal discrimination at large are not a compelling interest; policies aimed at remedying discrimination in a particular institution or program can be considered a compelling interest. *Croson*, 488 U.S. at 499-506; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Furthermore, we note that no provision in the Covenant requires the use of “affirmative action” as a governmental policy.

458. The Committee urges the State Party to revise federal and state legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with Article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State Party to take all necessary steps to ensure respect of Article 7 of the Covenant.

459. Comment: While, consistent with reservation (2) of the United States to the Covenant, the Covenant imposes no constraint on the crimes for which the United States may impose capital punishment, under the United States Constitution the use of the death penalty is restricted to particularly serious offenses. Also, see our response to Comment 1. Regarding Article 7, the United States reminds the Committee that under U.S. reservation (3), the United States is bound by Article 7 only to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution. The United States government takes the position that methods of execution currently employed in the United States do not constitute cruel and unusual punishment under our Constitution.

460. The Committee urges the State Party to take all necessary measures to prevent any excessive use of force by the police; that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations

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Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated.

461. Comment: The United States refers the Committee to the various sections of this report that demonstrate that the United States, at the state and federal level, prohibits and punishes excessive use of force by government officials.

462. Regulations limiting the sale of firearms to the public should be extended and strengthened.

463. Comment: This recommendation states a policy preference rather than addressing a duty or obligation under the Covenant. As the Committee is aware, the Second Amendment of the United States Constitution states that “[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” The United States recognizes that this Amendment protects a right of the public to possess firearms. The Second Amendment, however, allows for reasonable restrictions designed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse, and there are many such restrictions at both the federal and state level. Pursuant to federal law, a person seeking to purchase firearms from a Federal Firearm Licensee is subject to a background check to determine whether the transfer should be denied because the person falls within a prohibited category. In addition, the United States government, under its Project Safe Neighborhoods initiative and in partnership with state and local law enforcement, vigorously prosecutes prohibited persons found in possession of firearms.

464. The Committee recommends that appropriate measures be adopted as soon as possible to ensure to excludable aliens the same guarantees of due process as are available to other aliens and guidelines be established which would place limits on the length of detention of persons who cannot be deported.

465. Comment: The Department of Homeland Security and the Department of Justice have promulgated extensive regulations gov-

erning the continued detention of aliens who are subject to an order of removal, deportation, or exclusion. See generally 8 C.F.R. 241.13, 241.14, 1241.14.

466. The United States Supreme Court has long held that aliens who have been stopped at the border and are seeking admission in the first instance or who have been inspected and denied admission have no constitutional or statutory entitlement to be admitted or released into the United States. *See generally* *Zadvydas v. Davis*, 533 U.S. 678, 693-694 (2001); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *see also* *United States v. Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) (“The government’s interest in preventing the entry of unwanted persons . . . is at its zenith at the international border.”); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”). In neither *Zadvydas v. Davis*, 533 U.S. 678 (2001), nor *Clark v. Martinez*, 125 S. Ct. 716 (2005), did the Supreme Court purport to impose constitutional limits on the government’s detention authority, especially with regard to aliens who are dangerous to national security or who pose threats to public safety.

467. The Committee’s recommendation was given careful consideration, but it is the view of the United States that current U.S. law fully satisfies the obligations the United States has assumed under the Covenant. United States immigration law draws reasonable distinctions, with respect to the nature and quantum of rights afforded in the detention and removal process, between aliens who were stopped at the border and not lawfully admitted to the United States and those who were lawfully admitted. Governments may make such reasonable distinctions under national law consistent with the Covenant. In addition, the United States has a legitimate interest in taking steps so that aliens who pose a threat to the public safety or national security are removed from the country as soon as

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practicable and, while awaiting removal, are subject to appropriate custody or detention.

468. The Committee does not share the view expressed by the government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State Party even when outside that state's territory.

469. Comment: The United States continues to consider that its view is correct that the obligations it has assumed under the Covenant do not have extraterritorial reach. Please note Annex I to this report.

470. The Committee expresses the hope that measures be adopted to bring conditions of detention of persons deprived of liberty in federal or state prisons in full conformity with Article 10 of the Covenant. Legislative, prosecutorial and judicial policy in sentencing must take into account that overcrowding in prisons causes violation of Article 10 of the Covenant.

471. Comment: All prisons in the United States are subject to the strictures of the federal Constitution and federal civil rights laws. Prisons must ensure that "inmates receive adequate food, clothing, shelter, and medical care and must 'take reasonable measures to guarantee the safety of inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994). The Americans with Disabilities Act and the Rehabilitation Act generally require prison physical spaces and programs to be accessible to inmates with impairments, subject to appropriate security and safety concerns, and the Individuals with Disabilities in Education Act requires prisons to provide inmates with appropriate special educational services.

472. As noted, the federal Constitution prohibits prison conditions, including overcrowding, when such constitutes "cruel and unusual punishment." *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981). However, in making such a determination, "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime,

and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens.” *Id.* Overcrowding, standing alone, does not violate federal law. Nor does the United States agree that overcrowding, standing alone, violates Article 10(1).

473. Existing legislation that allows male officers access to women’s quarters should be amended so as to provide at least that they will always be accompanied by women officers.

474. Comment: It is not the practice of the federal Bureau of Prisons or of most state corrections departments to restrict corrections officers to work only with inmates of the same sex. Furthermore, requiring female officers always to be present during male officers’ access to women’s quarters would be extremely burdensome on prison resources. Appropriate measures are taken, however, to protect female prisoners. Staff are trained to respect offenders’ safety, dignity, and privacy, and procedures exist for investigation of complaints and disciplinary action—including criminal prosecution—against staff who violate applicable laws and regulations.

475. Conditions of detention in prisons, in particular in maximum security prisons, should be scrutinized with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein.

476. Comment: All prisoners in the United States are guaranteed treatment that does not constitute cruel and unusual punishment prohibited by the United States Constitution. Also, see the response to Question 10, *supra*. It is also worth noting that the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials are non-binding recommendations.

477. Appropriate measures should be adopted to provide speedy and effective remedies to compensate persons who have been subjected to unlawful or arbitrary arrests as provided in Article 9, paragraph 5, of the Covenant.

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478. Comment: The Constitution of the United States prohibits unreasonable seizures of persons, and the Supreme Court has allowed the victims of such unconstitutional seizures to sue in court for money damages. *See, e.g., Bivens v. Six Unnamed Known Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the United States reminds the Committee of the understanding (2) of the United States concerning Article 9(5).

479. The Committee recommends that further measures be taken to amend any federal or state regulation which allow, in some states, non-therapeutic research to be conducted on minors or mentally-ill patients on the basis of surrogate consent.

480. Comment: The U.S. government's position in the protection of human subject regulations is grounded in extensive public review and debate, based on the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Fourteen federal government departments and agencies have adopted regulations that provide protection for human subjects in federally-conducted or -supported research. Under these rules, a legally authorized representative may consent to a subject's participation in research, including non-therapeutic research. This includes mentally ill subjects or subjects with impaired decision-making capacity, including minors. The rules provide rigorous safeguards for research subjects in general and recognize that additional protections may be necessary for vulnerable populations. The U.S. government does not see a need to reexamine that position.

481. The Committee recommends that the current system in a few states in the appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.

482. Comment: The United States does not believe there is any reason to reconsider the state practice of election of judges. Popular election of judges, though not provided for in the federal Constitution, is one means of ensuring democratic accountability of the state and local judicial branch of government. Furthermore, each state is entitled to determine the structure of its government, with only limited, circumscribed restrictions in federal law.

483. The Committee recommends that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished. The Committee urges the government to ensure that there is a full judicial review in respect of determinations of federal recognition of tribes. The Self-Governance Demonstration Project and similar programs should be strengthened to continue to fight the high incidence of poverty, sickness and alcoholism among Native Americans.

484. Comment: Under United States Constitutional law, the Congress has plenary power over Native American communal rights.

485. Indigenous groups seeking recognition as federally recognized tribes may submit an application for recognition to the Department of the Interior, or else be recognized through Congressional or other Executive Branch actions. Indigenous groups who are unsuccessful in this process may seek review of a recognition decision in a United States federal court.

486. The United States also provides a diverse array of funding and training opportunities, as well as direct services, available to Native Americans and Alaska Natives, some of which promote home ownership and small business development, combat drug and alcohol abuse, promote health and healthy living, and equip and train law enforcement officials.

487. The Committee expresses the hope that, when determining whether currently permitted affirmative action programs for minorities and women should be withdrawn, the obligation to provide Covenant's rights in fact as well as in law be borne in mind.

488. Comment: See response to Question 4, *supra*.

489. The Committee recommends that measures be taken to ensure greater public awareness of the provisions of the Covenant and that the legal profession as well as judicial and administrative authorities at federal and state levels be made familiar with these provisions in order to ensure their effective application.

490. Comment: There is extensive awareness of the provisions of the Covenant at the state and federal levels.



### Annex I: Territorial Application of the International Covenant on Civil and Political Rights

The Vienna Convention on the Law of Treaties (fn. omitted) states the basic rules for the interpretation of treaties. In Article 31(1), it states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Resort to this fundamental rule of interpretation leads to the inescapable conclusion that the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party.

Article 2(1) of the Covenant states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind.” Hence, based on the plain and ordinary meaning of its text, this Article establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party’s sovereign authority.

This evident interpretation was expressed in 1995 by Conrad Harper, the Legal Adviser of the U.S. Department of State, in response to a question posed by the UN Committee on Human Rights, as follows: Mr. HARPER (United States of America) said. . .

Mr. Klein had asked whether the United States took the view that the Covenant did not apply to government actions outside the United States. The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a Party’s territory. Article 2 of the Covenant expressly stated that each State Party undertook to respect and ensure the rights recognized “to all individuals within its territory and subject to its jurisdiction”. That dual requirement restricted the



scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words “within its territory” had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party’s territory.<sup>5</sup>

A further rule of interpretation contained in the Vienna Convention on the Law of Treaties states in Article 32 that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

In fact, there is no ambiguity in Article 2(1) of the Covenant and its text is neither manifestly absurd nor unreasonable. Thus there is no need to resort to the travaux préparatoires of the Covenant to ascertain the territorial reach of the Covenant. However, resort to the travaux serves to underscore the intent of the negotiators to limit the territorial reach of obligations of States Parties to the Covenant.

The preparatory work of the Covenant establishes that the reference to “within its territory” was included within Article 2(1) of the Covenant to make clear that states would not be obligated to ensure the rights recognized therein outside their territories.

In 1950, the draft text of Article 2 then under consideration by the Commission on Human Rights would have required that states ensure Covenant rights to everyone “within its jurisdiction.” The United States, however, proposed the addition of the requirement

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<sup>5</sup> *Summary record of the 1405th meeting: United States of America*, UN ESCOR Hum. Rts. Comm., 53rd Sess., 1504th mtg. at ¶¶ 7, 20, U.N. Doc. CCPR/C/SR 1405 (1995).

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that the individual also be “within its territory.”<sup>6</sup> Eleanor Roosevelt, the U.S. representative and then-Chairman of the Commission, emphasized that the United States was “particularly anxious” that it *not* assume “an obligation to ensure the rights recognized in it to citizens of countries under United States occupation.”<sup>7</sup> She explained that:

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.<sup>8</sup>

Several delegations spoke against the U.S. amendment, arguing that a nation should guarantee fundamental rights to its *citizens* abroad as well as at home. René Cassin (France), proposed that the

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<sup>6</sup> *Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles*, U.N. ESCOR Hum. Rts. Comm., 6th Sess. at 14, UN Doc. E/CN.4/365 (1950) (U.S. proposal). The U.S. amendment added the words “territory and subject to its” before “jurisdiction” in Article 2(1).

<sup>7</sup> *Summary Record of the Hundred and Ninety-Third Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 13, 18, U.N. Doc. E/CN.4/SR.193 at 13, 18 (1950) (Mrs. Roosevelt); *Summary Record of the Hundred and Ninety-Fourth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 5, 9, U.N. Doc. E/CN.4/SR.194(1950).

<sup>8</sup> *Summary Record of the Hundred and Thirty-Eighth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg at 10, U.N. Doc. E/CN.4/SR.138 (1950) (emphasis added).

U.S. proposal should be revised in the French text replacing “*et*” with “*ou*” so that states would not “lose their jurisdiction over their foreign citizens.”<sup>9</sup> Charles Malik (Lebanon) cited three possible cases in which the United States amendment was open to doubt:

First, . . . [the] amendment conflicted with Article [12], which affirmed the right of a citizen abroad to return to his own country; it might not be possible for him to return if, while abroad, he were not under the jurisdiction of his own government. Secondly, if a national of any state, while abroad were informed of a suit brought against him in his own country, he might be denied the rightful fair hearing because of his residence abroad. Thirdly, there was the question whether a national of a state, while abroad, could be accorded a fair and public hearing in a legal case in the country in which he was resident.<sup>10</sup>

Mrs. Roosevelt in responding to Malik’s points, could “see no conflict between the United States’ amendment and Article [12]; the terms of Article [12] would naturally apply in all cases.”<sup>11</sup> Additionally, she asserted that “any citizen desiring to return to his home country would receive a fair and public hearing in any case brought against him.”<sup>12</sup> Finally, she reiterated generally that “it was not possible for any nation to guarantee such rights [e.g., the right

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<sup>9</sup> *Summary Record of the Hundred and Ninety-Third Meeting, supra* note 2, at 21. (Mr. René Cassin). Several states maintained similar positions. *See, Summary Record of the Hundred and Ninety-Fourth Meeting, supra* note 2, at 5 (Mauro Mendez, representative of Philippines); *Id.* (Alexis Kryou, representative of Greece); *Id.* at 7 (Joseph Nisot, representative of Belgium); *Id.* at 8 (Branko Jevremovic, representative of Yugoslavia).

<sup>10</sup> *Id.* at 7. (Charles Malik proposed the addition of the words “in so far as internal laws are applicable” following the U.S. amendment.)

<sup>11</sup> *Id.* (Mrs. Roosevelt) ICCPR Article 12(4) provides that “No one shall be arbitrarily deprived of the right to enter his own country.”

<sup>12</sup> *Summary Record of the Hundred and Ninety-Fourth Meeting, supra* note 2, at 7 (Mrs. Roosevelt).

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to a fair trial in foreign courts] under the terms of the draft Covenant to its nationals resident abroad.”<sup>13</sup>

Ultimately, the U.S. amendment was adopted at the 1950 session by a vote of 8-2 with 5 abstentions.<sup>14</sup> Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase “within its territory” at both the 1952 session of the Commission<sup>15</sup> and the 1963 session of the General Assembly.<sup>16</sup>

### 3. UN Commission on Human Rights

In addition to the general issues addressed here, U.S. positions concerning specific issues addressed by the UN Commission on Human Rights (“UNCHR”) in 2005 are reported under relevant substantive headings below. Resolutions and related material from the final session of the UNCHR, meeting from March 14-April 22, 2005, are available in the Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

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<sup>13</sup> *Id.* Several states maintained that the United States position was the most sound and logical one. *See, Id.* at 6 (Dr. Carlos Valenzuela, representative of Chile); *Id.* at 8 (E.N. Oribe, representative of Uruguay)

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Draft International Convention on Human Rights and Measures of Implementation*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment); *Summary Record of the Three Hundred and Twenty-Ninth Meeting*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., 329th mtg. at 14, UN Doc. E/CN.4/SR.329 (1952) (vote rejecting amendment). During the debate France and Yugoslavia again urged deletion of the phrase within its territory because states should be required to guarantee Covenant rights to citizens abroad. *Id.* at 13 (P. Juvigny, representative of France); *Id.* at 13 (Branko Jevremovic, representative of Yugoslavia).

<sup>16</sup> *Draft International Convention on Human Rights and Measures of Implementation*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment); *Summary Record of the Three Hundred and Twenty-Ninth Meeting*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., 329th mtg. at 14, UN Doc. E/CN.4/SR.329 (1952) (vote rejecting amendment). During the debate France and Yugoslavia again urged deletion of the phrase within its territory because states should be required to guarantee Covenant rights to citizens abroad. *Id.* at 13 (P. Juvigny, representative of France); *Id.* at 13 (Branko Jevremovic, representative of Yugoslavia).

**a. Procedure and practice**

**(1) UN reform**

Proposals for abolition of the UN Commission on Human Rights and creation in its place of a Human Rights Council are discussed in Chapter 7.A.1. On Special Procedures in the work of the UNCHR, Lino Piedra, Public Member of the U.S. Delegation, addressed the UNCHR on April 18, 2005, as excerpted below. The full text of Mr. Piedra's remarks is available at [www.humanrights-usa.net/2005/0418Item18.htm](http://www.humanrights-usa.net/2005/0418Item18.htm).

The United States strongly supports the work of the Special Procedures. My government believes that the Special Procedures have an important role in furthering the goals of the Commission on Human Rights and of the United Nations in the area of human rights. We also commend the individual mandate holders for their dedication to accomplishing their difficult and often thankless tasks.

However, due to the limited resources available to the Office of the High Commissioner, and also due to the already extensive burden that is placed on the Office by the support they provide to the Special Procedures mandates, we feel that it is necessary to examine what we view as a growing tendency to address human rights problems with an almost automatic decision to establish a new Special Mechanism. . . .

The United States believes that the integrity of the Special Procedures must be preserved through a deliberate and careful examination of the necessity and purpose of each mechanism, and of the results of their work. With roughly 40 Special Procedures in existence now, we must resist the temptation to react reflexively to every perceived human rights problem with the establishment of a new Special Mechanism. Moreover, we cannot simply leave it for the rapporteur, expert, or working group, and their staffs, to implement their mandates without adequate and appropriate guidance and support, particularly in terms of resources.

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### (2) *Situations in specific countries*

On March 24, 2005, Senator Rudy Boschwitz, head of the U.S. delegation, addressed the 61st meeting of the UNCHR concerning Item 9, “Violations of Human Rights in any Part of the World,” stating:

The United States particularly values this segment of the Commission—when we focus on the situation of human rights in specific countries around the world. We are convinced that reinforcing positive developments when they occur is an important part of the work of this body. And we are equally convinced that putting dictators and other human rights violators on notice that the international community is watching, and that there will be consequences for their misdeeds . . . brings us closer to the day when all nations are part of the growing community of democracies, and tyranny and slavery exist only as sad chapters in human history.

... [T]hough some of you would prefer to dispense with Item 9, it is not sufficient for this body to condemn the abuses but shy away from naming the abusers. Speaking clearly about all those regimes that commit such abuses is necessary if this Commission is to retain its credibility.

The full text of Senator Boschwitz’s remarks, which include a review of notable progress in specific countries and concerns with others, is available at [www.humanrights-usa.net/2005/0324Item9.htm](http://www.humanrights-usa.net/2005/0324Item9.htm). See also U.S. statements on specific countries considered under Agenda Item 9 including Resolution 2005/13 on Belarus at [www.state.gov/p/io/rls/othr/44779.htm](http://www.state.gov/p/io/rls/othr/44779.htm); Resolution 2005/12 on Cuba at [www.state.gov/p/io/rls/othr/44780.htm](http://www.state.gov/p/io/rls/othr/44780.htm); and Resolution 2005/11 on the Democratic People’s Republic of Korea at [www.humanrights-usa.net/2005/0414Item9NKorea.htm](http://www.humanrights-usa.net/2005/0414Item9NKorea.htm).

### ***b. Distinction between international human rights law and international humanitarian law***

On April 20, 2005, T. Michael Peay, Legal Adviser to the U.S. Mission to the United Nations in Geneva, delivered an

explanation of the U.S. vote against Resolution 2005/63, "Protection of Human Rights of Civilians in Armed Conflicts." The explanation of vote, excerpted below, is available at [www.humanrights-usa.net/2005/0420L82Peay.htm](http://www.humanrights-usa.net/2005/0420L82Peay.htm). Resolution 2005/63 is available in the UNCHR Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf)

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The United States agrees with the fundamental importance of the protection of civilians during armed conflict, but is constrained to call for a vote on this resolution because it conflates and confuses international humanitarian law and international human rights law. Though many of the principles of humane treatment found in the law of armed conflict also find similar expression in human rights law, these are nonetheless two separate and conceptually distinct areas of law. The distinguished and highly respected international law scholar, Jean Pictet, explained it this way: the law of armed conflict and human rights law "have the same origin: they stem from the need to protect the individual against those who would crush him [or her]." Pictet goes on to say that these two fields of law "are distinct and should remain so."

During the informals, the United States offered clear and precise textual amendments to several paragraphs of this resolution to reflect this fundamental precept, amendments which, had they been accepted, could have allowed for consensus adoption of this resolution. For example, we requested that PP 6 be rephrased as follows: "Acknowledging that human rights law and international humanitarian law are two separate bodies of law that are complementary in their aims and contain many similar protective principles but generally apply to different situations."

As a further example, we proposed as text for OP 3: "Urges States to end impunity for violations of IHL and applicable provisions of international human rights law during periods of international armed conflict by bringing the perpetrators to justice, in accordance with their international obligations."

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. . . Regrettably, because the final resolution text continues to blur the distinctions between these two bodies of law in an unhelpful and potentially dangerous way, the United States will vote “no” on this resolution.

### B. DISCRIMINATION

#### 1. Race

##### *a. Report of the United States to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*

The U.S. report to the UNCHR, discussed in A.2. *supra*, addresses U.S. implementation of Article 18, “Freedom of thought, conscience and religion,” in paragraphs 313-26. The report is available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm).

##### *b. UNCHR*

On March 21, 2006, Goli Ameri, public member of the U.S. delegation to the UNCHR, addressed the UN Commission on Human Rights on Agenda Item 6, “Racism, Racial Discrimination, Xenophobia, and all Forms of Discrimination.” The full text of Ms. Ameri’s remarks, excerpted below, is available at [www.humanrights-usa.net/2005/0321ameri.htm](http://www.humanrights-usa.net/2005/0321ameri.htm).

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The U.S. Government remains committed to the fight against racism, racial discrimination, xenophobia and related intolerance wherever and whenever they occur—in our own country and around the world.

The record of the United States is not unblemished in these matters. My country’s history of violent mistreatment of Native Americans, enslavement and discrimination against African-Americans, as well as other racial and ethnic injustices, is well known. These episodes are in our past, and we continually fight to overcome their legacy. Nevertheless, my country is proud of the progress we have made and continue to make. . . .



Today, the United States is one of the most racially diverse countries in the world, in large part because of our history of immigration. As a matter of national policy, the U.S. Government has long condemned discrimination and vigorously enforces laws and programs designed to ensure equality of opportunity. Foremost among protections against discrimination, the U.S. Constitution and its Amendments, coupled with the federal civil rights legislation enacted in the 1960s, prohibit discrimination based on race, religion, or national origin. For more than half a century, our federal government has promoted equality by enacting and enforcing statutes that prohibit racial and ethnic discrimination in housing, employment, education, voting and access to public accommodations. While we still have a long way to go, the United States strives, with the passage of time, to be more racially and ethnically tolerant and united, and to celebrate our differences rather than use them as excuses for discrimination.

Yet, despite this progress, racism continues to exist in the United States and race-based disparities of economic well-being persist. President Bush has made issues of racial diversity and equal opportunity an important part of his agenda. Indeed, the President's cabinet is the most diverse in the history of the United States.

Meanwhile, let us not forget that the battle against racism globally must involve fighting anti-Semitism and Islamophobia, insidious forms of racial and religious prejudice, which remain prevalent throughout the world. Since the tragic events of 9/11, President Bush has repeatedly made public statements reminding the citizens of the United States that we are a multi-cultural and multi-ethnic society, and that we must continue to respect and celebrate the diversity in our country.

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***c. Organization of American States***

On June 7, 2005, the Organization of American States General Assembly adopted a resolution, "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention." AG/RES.2126 (XXXV-O/05), available in Proceedings of

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the Thirty-Fifth Regular Session of the Organization of American States General Assembly, Volume I, OEA/Ser.P/XXXV-O.2, at [www.oas.org/juridico/English/gao5/gao5.doc](http://www.oas.org/juridico/English/gao5/gao5.doc). The United States reserved on paragraph 1 of the resolution, in which the General Assembly resolved to instruct the Permanent Council to establish a working group “with a view to the Working Group’s preparation of a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance,” as well as on related provisions in paragraphs 7 and 8b. Footnote one to the resolution records the explanation of the U.S. position as set forth below.

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The United States reserves on paragraphs 1, 7, and 8b because it believes the working group should not begin the process of preparing a new convention against racism. As there is already a robust global treaty regime on this topic, most notably the International Convention on the Elimination of All Forms of Racial Discrimination to which some 170 countries are States Parties, a regional instrument is not necessary and runs the risk of creating inconsistencies with this global regime. The United States supports the creation of a working group, but believes that the working group should be more action oriented in addressing the scourge of racism and discrimination. Such a working group should analyze the forms and sources of racism and discrimination in the Hemisphere and identify practical steps that governments in the Hemisphere might adopt to combat racism and other forms of discrimination, including best practices in the form of national legislation and enhanced implementation of existing international instruments. This would be aimed at bringing immediate and real-world protection against discrimination. In light of this position, the United States cannot, in good faith, join in the consensus on those paragraphs within an OAS resolution that support the preparation of a new convention against racism.

## **2. Gender**

### ***a. Women's justice and empowerment in Africa***

On June 30, 2005, President George W. Bush announced an initiative to "support women's justice and empowerment in Africa." A fact sheet describing the new program, released by the White House on the same date, is excerpted below and available in full at [www.whitehouse.gov/news/releases/2005/06/20050630-5.html](http://www.whitehouse.gov/news/releases/2005/06/20050630-5.html). The four target countries referred to in the press release are Benin, Kenya, South Africa, and Zambia.

#### **Today's Action**

- Today, President Bush announced approximately \$55 million to support women's justice and empowerment in Africa. This initiative will work to assist the existing efforts of four African countries to combat sexual violence and abuse against women, and empower them in society. As the programs in these four nations develop, their successes will produce a ripple effect through other countries in their regions.

#### **Protecting and Empowering Women**

- The \$55 million will be used to bolster women's justice and empowerment in Africa by:
  - Strengthening the capacity of the legal system to protect women and punish violators by training police, prosecutors, and judges in sexual violence and abuse cases against women, and developing or strengthening laws which protect women and empower their role in society.
  - Rehabilitating, reintegrating, and empowering former victims in society by bolstering the capacity of shelters and counseling programs, and addressing health care needs of women.
  - Increasing awareness of the need for women's justice and empowerment, through high-level engagement, conferences, public awareness, and education.

- **Women's Justice and the Link to HIV/AIDS:** The \$55 million announced today would complement America's ongoing efforts to stem the spread of HIV/AIDS and fight human trafficking. . . .
- **Empowerment of Women through the Legal System:** Many African nations have already taken steps to improve legal rights for women, including new sexual offenses laws, higher penalties for sexually violent offenses against women, anti-trafficking and prostitution legislation, and laws which grant women greater rights to property and inheritance.
  - The four target countries identified for this program have all taken some steps, but require additional support and technical assistance for adequate implementation including: police, investigative, prosecutorial, and judicial training and assistance; the development of DNA labs and other specialized equipment; the establishment of Hotline numbers for reporting rape or violence; the development of laws criminalizing violence and abuse against women and new evidentiary rules to protect the identity of women; and the development of women's empowerment laws.

**b. Reproductive rights**

On March 11, 2005, Ambassador Ellen Sauerbrey, U.S. Representative to the UN Commission on the Status of Women ("CSW"), addressed the 49th Session of the CSW. Excerpts below from Ambassador Sauerbrey's remarks address issues related to reproductive rights. The full text is available at [www.un.int/usa/05\\_057.htm](http://www.un.int/usa/05_057.htm). See also statement of Laurie Lerner Shestack, explaining the U.S. decision to join consensus on Women in Development, A/C.2/60/L.64, in the Second Committee (Economic and Financial), on December 19, 2005, available at [www.un.int/usa/05\\_271.htm](http://www.un.int/usa/05_271.htm).

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The Beijing Declaration and Platform for Action express important political goals that the United States endorses. We reaffirm the goals, objectives, and commitments of the Beijing Declaration and Platform for Action based on several understandings. We understand these documents constitute an important policy framework that does not create international legal rights or legally binding obligations on states under international law.

. . . [W]e have heard no delegation disagree with our interpretation that the Beijing documents create no new international rights, including a right to abortion. In addition, we appreciate your own assertion that the Beijing documents “should not be seen as creating any new human rights.” This week we heard an international consensus on this point, which is useful to clarifying the intent and purpose of Beijing.

Based on consultations with states, we further understand that states do not understand the Beijing or Beijing+5 outcome documents to constitute support, endorsement, or promotion of abortion. Our reaffirmation of the goals, objectives, and commitments of these documents does not constitute a change in the position of the United States with respect to treaties we have not ratified.

The United States fully supports the principle of voluntary choice regarding maternal and child health and family planning. We have stated clearly and on many occasions, consistent with the [International Conference on Population and Development (“ICPD”)], that we do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. The United States understands that there is international consensus that the terms “reproductive health services” and “reproductive rights” do not include abortion or constitute support, endorsement, or promotion of abortion or the use of abortifacients.

The United States supports the treatment of women who suffer injuries or illnesses caused by legal or illegal abortion, including for example post-abortion care, and does not place such treatment among abortion-related services.

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**c. *Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing***

On April 15, 2005, the UNCHR adopted without a vote Resolution 2005/25, "Women's Equal Ownership, Access to and Control over Land and the Equal Rights to own Property and to Adequate Housing," Before the vote, U.S. delegation member Goli Ameri addressed U.S. concerns with the draft resolution. In addition to stating the U.S. understandings related to the Beijing outcome documents and abortion, *see* 2.b. *supra*, Ms. Ameri cited specific issues as excerpted below.

The full text of Ms. Ameri's statement is available at [www.humanrights-usa.net/2005/0415Item10L34.htm](http://www.humanrights-usa.net/2005/0415Item10L34.htm). Resolution 2005/25 is available in the UNCHR Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf)

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Concerning PP4, PP9, PP12 and OP4, the United States does not support the "right to adequate housing" or "housing rights," because such a right does not exist. The Universal Declaration on Human Rights mentions a "right to a standard of living adequate for the health and well-being of (oneself) and (one's) family, including . . . housing." I must make clear that the United States accepts and supports the equal right to own land, property and to adequate housing. The important emphasis here should be non-discrimination: women should have the equal ability to obtain adequate housing.

The United States regrets that the resolution fails to address the crucial issue of inheritance rights for women. When there are unequal inheritance laws in a country, women cannot benefit from the property rights enumerated in this resolution.

Concerning PP7, the United States clarifies that the term "substantive equality" means *de facto* equality.

Concerning PP16, we believe a needs-based approach to addressing the impact of natural disaster on women, boys and girls is the most effective approach.

Concerning OP6, the United States clarifies that obligations relating to the Convention on the Elimination of Discrimination against Women is only applicable to States parties to the convention.

Finally, sovereign states must determine through open, participatory debate and democratic processes, the policies and programs they consider will be most effective in progressively realizing the achievement of economic, social and cultural rights and objectives; each State must determine in accordance with its own system the role of various institutions in its society in carrying out such policies and programs and each State must define in a manner consistent with its own legal system the administrative and legal recourse available to those seeking review of the implementation of those policies and programs.

***d. Equality of opportunity***

On September 27, 2005, Felice Gaer, Commissioner, U.S. Commission on International Religious Freedom, addressed the OSCE Human Dimension Implementation Meeting in Warsaw on equality of opportunity for women and men. The full text of the statement, excerpted below, is available at [www.usosce.gov/archive/2005/09/HDIM\\_On\\_Equality\\_of\\_Opportunity\\_09\\_27\\_05.pdf](http://www.usosce.gov/archive/2005/09/HDIM_On_Equality_of_Opportunity_09_27_05.pdf).

Mr. Moderator, the OSCE participating States agreed in the Helsinki Final Act to “respect human rights and fundamental freedoms . . . for all without distinction as to race, sex, language or religion.” Despite this commitment and constitutional assertions of equality for all their citizens, many states do little to rectify abuses that primarily affect the human rights of women. Such abuses include discrimination in access to education, economic opportunities or the political process, the refusal of law enforcement authorities to respond to physical or sexual assaults against women by spouses or other family members, or the sexual abuse of women at the hands of combatants. Progress on such issues will be enhanced through the political will of leaders in the OSCE States as well as OSCE initiatives if focused on specific and concrete issues.

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In June, the Swedish Government sponsored an OSCE meeting on the role of women in conflict prevention and crisis management. Much attention was paid to the need to improve women's participation in decision-making structures. . . . Laws or regulations that discriminate against women and prevent them from participating in the political process or deny them equal access to economic opportunities violate women's inalienable rights and should be eliminated. Holding governments responsible for protecting against such violations is an important function of any society governed by the rule of law.

The United States seeks to broaden women's political participation in many ways. In 2003, the United States successfully advanced a resolution at the UN General Assembly on "Women and Political Participation." Political participation involves not only voting, but also advocating, governing, serving in elected and appointed positions, and being involved in decision-making processes, including conflict prevention and resolution processes. The U.S. resolution called on states to eliminate laws and regulations that discriminate against women and prevent them from participating in the political process and to promote equal access to education, information technology, and economic opportunities that enable women to take part fully in the decision-making process. As we have noted on previous occasions, the OSCE is in a unique position to promote equality of access to the political process and to help increase women's participation. We encourage the OSCE to assist in voter awareness-raising campaigns to reach out both to women and men. We encourage the OSCE to conduct leadership training seminars and to reach out to women to participate actively in other OSCE training, such as judicial, legislative and human rights training. OSCE participating States can and must immediately take action to eliminate barriers that prevent full access to the political process and to ensure equal participation of women in all aspects of the democratic process.

Without basic economic resources, however, political participation is unlikely. OSCE States have committed to "encourage measures effectively to ensure full economic opportunity for women, including non-discriminatory employment policies and practices." Despite this commitment, women in many participating



States do not enjoy full and equal economic opportunities. . . . The United States urges all OSCE participating States to enact anti-discrimination laws that enable women, and other targets of discrimination, to pursue an adequate and effective remedy against such discrimination. The United States further urges those states with anti-discrimination laws on the books to support their enforcement through government oversight. This is an area in which the Office for Democratic Institutions and Human Rights and the Office of the Coordinator for Economic and Environmental Activities could actively collaborate to provide technical assistance to OSCE participating States.

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Women who are beaten in their homes or attacked on the streets, raped, trafficked, or subjected to other forms of violence that threaten their health and their lives cannot participate effectively in the political process, the economy, or the social life of a country. . . .

Effectively addressing this issue requires a framework that provides legal accountability for abusers and fosters the ability of authorities or civil society to respond to a victim's pleas for help. We congratulate Macedonia for its newly enacted laws on domestic violence, but note once again that Albania, Armenia, Azerbaijan, Georgia, Kazakhstan, Lithuania, Moldova, Romania, Russia, and Uzbekistan, still do not explicitly define domestic violence as a crime, or define it only as a misdemeanor. We urge the governments of these participating States to make it a priority in the coming year to work with civil society to review and strengthen their laws in this area. Likewise, we urge the Governments of Georgia, Kyrgyzstan and Tajikistan to work toward the elimination of abductions, forced marriage and rape of young women as brides.

Finally, we must continue to view the effort to achieve equality of opportunity for women and men as an integral part of the OSCE's efforts to develop democratic institutions, free and fair elections, the rule of law, and respect for fundamental freedoms. . . .

***e. Report of the United States to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights***

The U.S. report to the UNCHR addresses U.S. implementation of Article 3 of the International Covenant on Civil and Political Rights, “Equal rights of men and women,” in paragraphs 60–88, excerpted in A.2. *supra*, and Annex II, “Programs to Protect Women from Violence.” The report is available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm).

**3. Religion**

***a. Report on International Religious Freedom***

On November 8, the Department of State submitted to Congress and released to the public the 2005 Annual Report on International Religious Freedom, submitted pursuant to § 102(b) of the International Religious Freedom Act of 1998, 22 U.S.C. § 6412(b). Among other things, the report identified Burma, China, Iran, North Korea, Sudan, Eritrea, Saudi Arabia, and Vietnam as “countries of particular concern” because of particularly severe violations of religious freedom. The report is available at [www.state.gov/g/drl/rls/irf/2005/](http://www.state.gov/g/drl/rls/irf/2005/).

A fact sheet issued on the same date by the Bureau of Democracy, Human Rights, and Labor of the Department of State is set forth below and available at [www.state.gov/g/drl/rls/56588.htm](http://www.state.gov/g/drl/rls/56588.htm).

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**OUR NATION’S HERITAGE, A UNIVERSAL RIGHT**

Religious freedom is the inalienable right of individuals and groups to choose or change beliefs as their consciences dictate and to be free from intimidation, restrictions and biases based on those beliefs. America’s founders enshrined the free exercise of religion and freedom from state control in the First Amendment to the Constitution. Foundational international human rights documents, including the Universal Declaration of Human Rights and the

International Covenant on Civil and Political Rights, establish the right of religious freedom for all people.

United States foreign policy promotes religious freedom in accord with U.S. national heritage and universally recognized principles. The International Religious Freedom Act of 1998 (IRF Act) raised the intensity of U.S. efforts by creating the position of Ambassador at Large for International Religious Freedom in the Department of State. The IRF Act also created the Office of International Religious Freedom, located in the Bureau of Democracy, Human Rights and Labor.

#### PROMOTING CHANGE AND ADVANCING OPPORTUNITY

Promoting religious freedom has become increasingly critical with the rise of extremism worldwide. Our tasks are to confront elements in societies or governments that encourage intolerance or hatred of religious groups and to promote respect for all faiths, advance opportunity for individuals to openly practice their beliefs, and preserve the dignity of every religious group.

In the last year, there have been significant advances internationally, including:

- The removal of legal barriers to the free, unrestricted belief and practice of religious faith, including bans on forced renunciations of faith, and gains in civil rights legislation for religious minorities in many countries, including Turkmenistan, Pakistan, and the United Arab Emirates.
- Government intervention in several countries, including Russia, France, and India, when societal attitudes toward minority religious groups led to discrimination and threatened their physical wellbeing.

#### OUR EFFORTS TO PROMOTE RELIGIOUS FREEDOM

The United States Government advocates, promotes, monitors, and reports on international religious freedom. The 197 country reports in the 2005 Annual Report on International Religious Freedom survey the religious demographics, status and treatment of all religious groups by governments and in civil sectors of society.

Appointed by President Bush in 2001, Ambassador at Large John Hanford III spearheads U.S. engagement with other governments on a wide variety of issues related to religious freedom, train-

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ing on the international norms that protect religious freedom, and assistance to those seeking refuge or asylum because of religious persecution, with a focus on severe violations of religious freedom. Where particularly severe violations continue, the Secretary may designate a Country of Particular Concern (CPC) under the IRF Act. In 2005, the Secretary re-designated Burma, China, Iran, North Korea, Sudan, Eritrea, Saudi Arabia and Vietnam.

### OUR COMMITMENT

In keeping with U.S. history and international norms, the United States will continue to stand with those seeking the freedom to believe and practice their faith without intimidation and hindrance.

### OVER THE LAST YEAR, THE UNITED STATES GOVERNMENT

- Entered into a binding agreement with Vietnam to improve religious freedom.
- Successfully negotiated the release of prisoners held in several countries because of their spiritual convictions.
- Found an Indian state-level official ineligible for a visa on grounds of particularly severe violations of religious freedom.
- Successfully encouraged Bangladesh not to declare the Ahmadiyyas as non-Muslim, increasing their security.

#### ***b. Religious freedom agreement with Vietnam***

On May 5, 2005, the U.S. Department of State announced the conclusion of the United States-Vietnam Religious Freedom Agreement. The full text of the press release, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/45712.htm](http://www.state.gov/r/pa/prs/ps/2005/45712.htm). The text of the agreement is confidential and has not been made public.

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We are pleased to announce that we have concluded an agreement with the Government of Vietnam that addresses a number of important religious freedom concerns. . . .

This achievement advances a key component of the President's freedom agenda. Working with Congress under the International

Religious Freedom Act, the Bush Administration has secured continuing cooperation with Vietnam on our religious freedom concerns. . . .

In recent weeks, Vietnam banned the practice of forced or coerced renunciations of faith, released a number of prominent prisoners of concern, and has begun to register and to permit the reopening of churches that had previously been closed. Most importantly, Vietnam has also enacted significant legislative reforms that hold the promise of major improvements in religious freedom in the near future. A new Ordinance on Religion took effect on November 15, 2004, and the crucial implementation regulations for this ordinance were just released in early March. These new laws and policies provide increased latitude and protection for religious belief and practice. In addition, the Prime Minister issued special instructions in February aimed at alleviating restrictions on religious practice faced by many Vietnamese Protestants. To build on these first steps, the Vietnamese have made a significant number of commitments. The Government of Vietnam has committed to fully implement the new legislation on religious freedom and to render previous contradictory regulations obsolete. They have also committed to instruct local authorities to strictly and completely adhere to the new legislation and ensure their compliance. The Government of Vietnam will also facilitate the process by which religious congregations are able to open houses of worship, and give special consideration to prisoners and cases of concern raised by the United States during the granting of prisoner amnesties. While these commitments offer a strong foundation, other important public steps remain to be taken, and the United States will continue to monitor developments in Vietnam closely.

**c. Anti-Semitism**

*(1) Report on Global Anti-Semitism*

The Department of State submitted its first Report on Global Anti-Semitism to Congress on December 30, 2004, pursuant to Pub. L. No. 108-332 (2004). The report is available at [www.state.gov/g/drl/rls/40258.htm](http://www.state.gov/g/drl/rls/40258.htm); see *Digest* 2004 at 276-77.

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On January 5, 2005, Ambassador Michael Kozak, Acting Assistant Secretary for Democracy, Human Rights, and Labor and Special Envoy for Holocaust Issues Ambassador Edward O'Donnell held an on-the-record briefing on the report. In his introductory remarks, Ambassador Kozak addressed the role of law and law enforcement in fighting anti-Semitism:

In effect, anti-Semites seek to gain support for their perverse agenda by identifying the issues that cause disaffection amongst various groups in a population and then skillfully blame Jews for the existence of such problems.

So combating anti-Semitism requires a three-pronged approach: First is one of education, to promote tolerance and respect and to identify the true causes of problems affecting various groups and thus to counter anti-Semitic propaganda; second is legislation to prohibit hate crimes; and the third is enhanced law enforcement efforts.

The briefing is available at [www.state.gov/g/drl/rls/spbr/40347.htm](http://www.state.gov/g/drl/rls/spbr/40347.htm).

#### (2) *UN General Assembly Holocaust Resolution*

On October 31, 2005, the United States co-sponsored the "Holocaust Remembrance" Resolution, U.N. Doc. A/RES/60/7, adopted November 21, 2005. A statement to the General Assembly by Ambassador John R. Bolton, U.S. Permanent Representative to the UN, is excerpted below and available at [www.un.int/usa/05\\_192](http://www.un.int/usa/05_192).

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It is appropriate that on the sixtieth anniversary of the founding of the United Nations we come together in support of a resolution to commemorate the sixtieth anniversary of the Holocaust and to honor and remember its victims.

Appropriate because the United Nations as an institution was built upon the ashes of the Holocaust and the Second World War with an important mission.

That mission is to help ensure that the international community will never again allow such a crime against humanity to be committed, never again allow the world to be plunged into such violence and chaos.

The greatest tribute we can pay to the Holocaust's millions of victims, of whom by far the greatest number were the six million Jews—one third of the Jewish people—who were robbed of their lives in Nazi death camps, is to ensure that we never forget them or their sacrifice.

We must do everything we can so that future generations in perpetuity will know of this great crime and learn its important lessons.

While the Holocaust occurred sixty years ago, its lessons are no less relevant today.

When a President of a Member State [Iran] can brazenly and hatefully call for a second Holocaust by suggesting that Israel, the Jewish homeland, should be wiped off the map, it is clear that not all have learned the lessons of the Holocaust and that much work remains to be done.

And when some member states shamefully hesitate to decisively condemn such remarks, it is clear that much work remains to be done.

That is why the resolution before us today is so important. Among its measures, it will designate January 27 of each year as an International Day of Commemoration in memory of the victims of the Holocaust, call for the Secretary-General to establish a program of Holocaust outreach, and urge member states to put into place educational programs to teach future generations the lessons of the Holocaust so as to prevent future acts of genocide.

This program will complement the work already undertaken by the Task Force for International Cooperation on Holocaust Education, Remembrance and Research, a group of twenty countries that has been working with governments, NGOs and civil society to introduce into school curricula material about the Holocaust and the devastation that can result when hatred is allowed to spread and is even encouraged by rogue governments.

Other international organizations such as the Organization for Security and Cooperation in Europe are emphasizing education, legislation and law enforcement as the measures that will contain and eventually eliminate racial and religious hatred.

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**d. UNCHR: Combating Defamation of Religions**

On April 12, 2005, Leonard Leo, public member of the U.S. delegation, explained the vote of the United States against Resolution 2005/3, "Combating Defamation of Religions." The resolution was adopted by recorded vote on the same date. The full text of Mr. Leo's remarks, excerpted below, is available at [www.humanrights-usa.net/2005/0414Item6.htm](http://www.humanrights-usa.net/2005/0414Item6.htm). Resolution 2005/3 is available in the UNCHR Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

The United States was founded on the principle of freedom of religion. We believe that a country must not only recognize, but protect as well, the right of each of its citizens to choose a religion, to change his or her religion, and to worship freely. This, of course, means that countries must not discriminate against individuals who choose a particular religion. But, it also means that countries must not close their eyes to attacks that occur against individuals because of their religion. Countries must have a legal framework in place to allow individuals the freedom of worship without fear of persecution.

We very much appreciate the work of the sponsor of this resolution to address and enumerate the denigration of religion in a number of its manifestations. . . . But this resolution is incomplete inasmuch as it fails to address the situation of all religions. . . . We also believe that any resolution on this topic must include mention of the need to change educational systems that promote hatred of other religions, as well as the problem of state-sponsored media that negatively targets any one religion, or people of a certain faith.

**4. Persons with Disabilities**

On August 8, 2005, Gilda Brancato, Office of the Assistant Legal Adviser for Human Rights and Refugees, provided the views of the United States on Article 21(a) of the draft disabili-



ties convention to the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. The relevant language concerns providing “persons with disabilities with the same range and standard of health and rehabilitation services as provided other citizens, including sexual and reproductive health services.” Ms. Brancato’s statement follows in full.

In keeping with the United States’ support for the unconditioned human dignity of all persons, we acknowledge the importance of protecting and caring for the health of persons with disabilities. This position reflects the United States’ view that every life has value and every person has promise. We would especially highlight the relationship between good reproductive health and the right of men and women with disabilities, with free and full consent, to marry and found a family.

We would like to suggest that delegations, in reviewing this draft, consider revising the current text to delete the word “services,” replacing it with “care.” We make this proposal mindful of the many human rights violations persons with disabilities have experienced regarding their sexual and reproductive health. Sadly, the United States speaks with significant historical experience on this matter, because programs of forced sterilization were carried out in our country. This shameful chapter of American history makes us particularly cautious as we approach this important subject.

Sexual and reproductive health care for individuals with disabilities should at all times be predicated on respect for individual desires and on health needs. For too long, disabled individuals have been subjected to reproductive health procedures that are not based on the health and well-being of the patient. My delegation therefore believes that the word “care” is linked more firmly to a therapeutic approach, which is essential in the context of this Convention. Our goal is to ensure that people with disabilities achieve full access to medical care centered on disease prevention and health promotion, and that such care is based on non-discriminatory treatment, with full consideration for human rights.

## C. CHILDREN

### 1. Convention on the Rights of the Child

In 2005 the Department of State updated a text prepared in 2004 for use in responding to inquiries concerning the U.S. decision not to ratify the Convention on the Rights of the Child. The revised text is set forth below. The 2005 text removed references to state laws imposing capital punishment on minors following the Supreme Court's decision finding imposition of the death penalty on offenders under the age of 18 unconstitutional. *Roper v. Simmons*, 543 U.S. 551 (2005), discussed in H.1.a. below.

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President Bush and this Administration are deeply committed to addressing issues important to children. For example, the United States has taken a leading role in emerging issues directly affecting the lives of children such as child labor and trafficking in persons. We begin our work on behalf of children by monitoring and reporting on the human rights treatment of children in all countries around the world. This reporting is in Section 5 of the annual Country Reports on Human Rights Practices, which can be found on the web at [www.state.gov](http://www.state.gov). Beyond reporting, the United States also is constructively engaged in a wide variety of both multilateral and bilateral activities benefiting children, both around the world and in the United States. The United States spends billions of dollars in foreign assistance to improve the economic status of women and children in education, health care, legal rights and other fields of endeavor. We will continue to be a strong advocate for children around the globe, seeking to address in real and practical ways their most pressing concerns.

With respect to the Convention, the United States supports that treaty's general goal of protecting the human rights of children throughout the world. Further, as you may know, our nation has a strong legal framework at the federal, state and local levels to protect the well being of children in the United States. The Convention,

however, raises several difficult issues with respect to U.S. law and policy. We therefore have no plans to submit it for ratification to the Senate, where several Members have expressed concerns that the Convention would impinge on U.S. sovereignty, state and local law, and the role of parents.

Of greatest concern to us is that the Convention does not sufficiently accommodate our federal form of government in that it would commit our Federal Government to positions on issues that in the United States are primarily regulated by state or local government (e.g., child custody, adoption and education). Also problematic is that the Convention calls on countries to bar life imprisonment without the possibility of parole for offenses committed by those under the age of 18. A number of U.S. states permit such punishment. The treaty also accords to children certain economic, social and cultural rights (e.g., “the right of the child to the enjoyment of the highest attainable standard of health” in Article 24) that are not recognized as legally enforceable rights in our system of governance.

While U.S. ratification of the Convention is thus problematic, we are happy to report that the United States has become a party to two optional protocols to the Convention, on (1) the Involvement of Children in Armed Conflict, and (2) the Sale of Children, Child Prostitution and Child Pornography. The Senate approved those protocols in December 2002. Though styled as protocols to the Convention on the Rights of the Child, both effectively operate as independent, stand-alone agreements under international law. The United States also is a party to International Labor Organization (ILO) Convention No. 182 on the Worst Forms of Child Labor.

This Administration is committed to combating the scourges of child soldiers, child prostitution and child labor, and will continue to pressure countries that willingly violate children’s human rights. We are grateful for your support and interest in this issue. We hope this information is helpful.

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### 2. Report of the United States to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights

The U.S. report to the UNCHR, discussed in A.2. *supra*, addresses U.S. implementation of Article 24 of the International Covenant on Civil and Political Rights, "Protection of Children," in paragraphs 362-96. The report is available at [www.state.gov/g/drl/rls/55504.htm](http://www.state.gov/g/drl/rls/55504.htm).

### D. ECONOMIC, SOCIAL, AND CULTURAL ISSUES

#### 1. UN Commission on Human Rights

Resolutions and related material from the sixty-first session of the UNCHR are available in the Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

##### a. *Realization of economic, social and cultural rights*

On April 15, 2005, the United States abstained in the vote on UNCHR Resolution 2005/22, "Question of the realization in all countries of economic, social, and cultural rights." An explanation of the U.S. vote provided by Joel Danies of the U.S. delegation, excerpted below, is available at [www.humanrights-usa.net/2005/0415Item10L24.htm](http://www.humanrights-usa.net/2005/0415Item10L24.htm).

... We believe that [this resolution] represents an overemphasis by this Commission on economic goals that are to be progressively achieved by each Member State, at the expense (in terms of the allocation of limited Commission time and resources) of civil and political rights that must be respected and enforced now.

In particular, we oppose the working group mentioned in OPs 14 and 15 whose goal is to draft an optional protocol to the ICESCR. We are concerned that any such instrument would purport to create legal entitlements and promote the justiciability of

economic “rights,” thereby pushing all countries to take the same approach to economic, social and cultural rights.

We do not believe that there is one sure formula that will ensure adequate housing, health care, education, and the array of asserted ESC “rights.” Accordingly, we consider it inappropriate for this Commission to attempt to impose a governmental solution that does not include private sector initiatives, recognize the fundamental workings of free market economies, or reflect an understanding of federal systems.

With regard to OP 8 concerning a so-called “right to water,” the United States does not believe it appropriate specifically to refer in resolutions to the general comments of treaty-based human rights committees, as these committees have not been given the mandate by the States Parties to those treaties to issue binding or authoritative legal opinions. With respect to General Comment 15 of the Committee on Economic, Social and Cultural Rights, the United States notes that it does not share the view of the Covenant expressed in that document.

***b. Right to food***

On April 14, 2005, Lino Piedra, Public Member of the U.S. Delegation, provided an explanation of the U.S. vote against adoption of Resolution 2005/18, “The Right to Food.” The resolution was adopted by recorded vote. Mr. Piedra’s statement, excerpted below, is available at [www.humanrights-usa.net/2005/0414Righttofood.htm](http://www.humanrights-usa.net/2005/0414Righttofood.htm).

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As delegations are aware, the United States has consistently taken the position that the attainment of any “right to adequate food” or “right to be free from hunger” is a goal or aspiration to be realized progressively that does not give rise to any international obligation nor diminish the responsibilities of national governments to their citizens.

In light of our long-standing views on this issue, we find that the current resolution, as did previous resolutions, contains numer-

ous objectionable provisions, including inaccurate textual descriptions of the underlying right.

Additionally, the Resolution takes note of the report and work of Special Rapporteur Jean Ziegler, with which we disagree in many respects. It would not be possible to detail all of the problems in that report in the time allotted here. . . .

In addition, as we have remarked in past years, it is unfortunate that the Special Rapporteur continues to use his reports as a forum for advancing novel legal assertions on issues related to food that are not grounded in existing international law and which are substantively unfounded. This is the case both in his characterization of the Voluntary Guidelines negotiated at the Food and Agricultural Organization—a document the United States strongly supports—and with respect to an entire section of the report on what he describes as “extraterritorial obligations of States to the right to food.” We do not agree with the assertions of the Special Rapporteur and again call upon him to use his time and energies dealing with the issue in a pragmatic and results-oriented manner.

We repeat our hope that in future years the sponsors of the resolution will accommodate our concerns so that we can join in the adoption.

**c. Development**

*(1) Right to development*

At the UNCHR on April 12, 2005, the United States requested a vote and voted against Resolution 2005/4, “Right to Development,” adopted by recorded vote. An explanation of the U.S. vote, provided by Joel Danies, is excerpted below and available at [www.humanrights-usa.net/2005/0412EOVL9.htm](http://www.humanrights-usa.net/2005/0412EOVL9.htm).

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. . . Our position on this resolution is well-known—the United States understands the term “right to development” to mean that each individual should enjoy the right to develop his or her intellec-

tual or other capabilities to the maximum extent possible through the exercise of the full range of civil and political rights.

Moreover, the resolution before us contains the same initiatives that we have found objectionable in years past, such as asking the Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document on a legally binding instrument on the Right to Development. We further note our concern regarding the conclusions of the Working Group this year, leaving us with no option but to join with other delegations in disassociating ourselves from its recommendations.

The United States will continue its long-standing commitment to international development and maintain, as a major goal of our foreign policy, helping nations achieve sustainable economic growth. Our delegation, however, does not believe this resolution helps to forward these goals and will therefore vote “no” and encourage others to join us.

On March 22, 2005, Mr. Piedra had elaborated on the definition of the “right to development” in addressing the draft resolution. The full text of Mr. Piedra’s remarks, excerpted below, is available at [www.humanrights-usa.net/2005/0322Item7.htm](http://www.humanrights-usa.net/2005/0322Item7.htm).

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In our view, each person has inherent human rights to life, liberty and an adequate standard of living as set down in the Universal Declaration of Human Rights. Taken together, these rights can be seen as a blueprint for human development and, within that context, we can talk about an individual’s right to development. However, we cannot talk about a nation’s right to development, at least in these precincts, for the simple reason that nations do not have human rights. They may have sovereign rights, but we are not here to talk about sovereign rights. We are here to talk about human rights—the rights of individuals and the responsibilities of states to see that those rights are respected. That is the business of this Commission.

What does this mean in the context of development? It means that states have the responsibility to provide their citizens with the

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political and civil rights, and economic and social freedoms, that are essential to each individual's full development. If any state fails in that responsibility, it fails its own citizens, and cripples its own hopes for development. Time and time again, it has been shown that states that protect political and civil liberties, and respect the economic rights and freedoms of individuals—including the right to property—have stronger, more vibrant economies than those where these rights are flouted.

### *(2) Transnational corporations*

On April 20, 2005, Leonard Leo, public member of the U.S. delegation, explained the decision of the United States to call for a vote and vote no on Resolution 2005/69, "Human rights and transnational corporations and other business enterprises." The resolution was adopted by recorded vote. Mr. Leo's remarks, set forth below, are available in full at [www.humanrights-usa.net/2005/0420Item17TNC.htm](http://www.humanrights-usa.net/2005/0420Item17TNC.htm).

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The United States has the strongest business regulatory environment in the world. U.S. corporations, whether working at home or abroad, are held to the highest standards of ethical behavior and respect for human rights. Corporations have an absolute and unambiguous responsibility to obey the law, and in so doing to honor the human rights of all individuals with whom they have contact.

Throughout the world, businesses are creating an environment to help ensure the strongest possible promotion of human rights. By the very nature of their core activities, they provide employment and income for individuals. They provide essential goods and services. They often contribute to education, training, and healthcare. They provide venues for the organization of civil society and labor movements that promote democratization. They contribute to the empowerment of individuals that is at the heart of ensuring protection of human rights. And they are the backbone for billions of dollars in charitable activity and support that benefits many throughout the world.

The value of the private sector to development has been strongly recognized in the Monterrey Consensus, and was most re-



cently expounded on in the Report of the Commission on the Private Sector and Development. By contrast, the resolution before us takes a negative tone towards international and national businesses, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are.

We have been down this path many times in the UN, and it is both sad and undeniable that the anti-business agenda pursued by many in this organization over the years has held back the economic and social advancement of developing countries.

The United States acknowledges the hard work and efforts of the sponsors in trying to forge a consensus resolution. In that spirit, we asked the co-sponsors of this resolution to make only two small changes to this resolution that would have clarified the text. The first was to remove any negative implications about the nature of the normal business impact on human rights. The second was to make clear that the exercise was not intended to further the cause of norms or a code of conduct for TNCs: human rights obligations apply to states, not non-state actors, and it is incumbent upon states when they deem necessary to adopt national laws that address the obligations of private actors. Though professing their agreement with these points, the co-sponsors declined to make the simple textual amendments that would have given us confidence as to the intentions of the exercise. The United States is unwilling to support a resolution that is thus both unclear and potentially so damaging to the cause of development. Therefore, with regret, we must call for the vote and the US will vote no.

***d. Health-related issues***

***(1) Human rights and AIDS***

On April 21, 2005, Mr. Leo provided an explanation of the U.S. position in joining consensus on draft resolution E/CN.4/2005/L.59, adopted as Resolution 2005/84, "The Protection of Human Rights in the Context of HIV/AIDS." The full text of Mr. Leo's remarks, excerpted below, is available at [www.humanrights-usa.net/2005/0421Item14.htm](http://www.humanrights-usa.net/2005/0421Item14.htm).

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The United States will join consensus this year on this Resolution, but with the explicit understanding that the Resolution as amended refers only to the basic Guidelines on HIV/AIDS and Human Rights as opposed to the broader elaboration and commentary alluded to in the Secretary General's 1997 Report (E/CNA/1997/37). The elaboration of those Guidelines is fundamentally at odds with United States law, and we could not accept such a broader reference. The United States, for example, does not accept the elaboration's exhortation to give legal recognition to same-sex marriage, and to decriminalize prostitution. Nor, for that matter, are we comfortable with a call for States to provide "sterile injecting equipment," without acknowledging in some way that, in many countries, including the United States, drug use is illegal. At all events, because of the nature of our Federal system, these issues are a matter of state and local law, and it would be inappropriate for the United States to ignore the principle of federalism by imposing these obligations.

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The United States also notes, with concern, that some Member States have endeavored to seek action in this Commission on a number of highly controversial and deeply divisive issues relating to sexuality in the context of thematic resolutions that address generally recognized and widely accepted goals. Here, we believe it is essential to limit references to the Guidelines so as to focus attention on the goal of treating individuals who suffer from AIDS with the dignity and worth they deserve. The provisions that elaborate on the Guidelines—seeking to reform laws prohibiting prostitution, adultery, sodomy, fornication, and same-sex marriage—bear little or no connection to the object of this Resolution, and incorporating them is out of place. States should heed paragraph 10(d) of the 1997 report on the Guidelines, which states that it is "the responsibility of all States to identify how they can best meet their human rights obligations and protect public health within their specific political, cultural, and religious contexts."

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On April 15, 2005, David Hohman of the U.S. delegation offered an amendment to draft resolution "Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria." The amendment was defeated by vote and the resolution was adopted without a vote as Resolution 2005/23. The United States joined consensus. Mr. Hohman's statement, excerpted below, is available at [www.humanrights-usa.net/2005/0415Item10L27.htm](http://www.humanrights-usa.net/2005/0415Item10L27.htm).

Mr. Chairman, we believe this is a very important resolution and regret, as in previous years, we cannot support language in a few of the paragraphs in this resolution.

We would like to clarify our understanding of OP 14, which calls upon States to conduct an impact assessment of the effects of international trade agreements with regard to public health. During informals the understanding emerged that the meaning of this paragraph would have been clearer if it "invited" States to undertake such assessments. Member states also expressed the view, and this is our understanding, that such assessments are to be carried out at the national level.

PP 1. reaffirms the International Covenant on Economic, Social and Cultural Rights. Some nations, including the United States, have not ratified the ESC Covenant and therefore cannot accept reaffirming it. During negotiations we had requested that the sponsors use standard language contained in other resolutions that would make PP 1 acceptable for us. These formulations include wording that "recalls" treaties to which all states are not parties, or language whereby states reaffirm their obligations under treaties they have ratified.

PP 2. reaffirms that "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is a human right." Because the U.S. believes this is a right to be realized incrementally, we asked the sponsors to add the clause "to be progressively realized" to the end of this paragraph. Without this addition, the wording can be misconstrued to create absolute legal entitlements in the health care field.

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### *(2) Highest attainable standard of physical and mental health*

Also on April 15, 2005, the United States asked for a vote and voted no on Resolution 2004/24, "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Mr. Hohman provided an explanation of the U.S. position set forth below and available at [www.humanrights-usa.net/2005/0415Item10L28.htm](http://www.humanrights-usa.net/2005/0415Item10L28.htm).

My delegation is not in a position to agree to PP1 or PP2 of this resolution for the same reasons we outlined during our consideration of the resolution on Access to Medications.

We have requested that the co-sponsors use standard language in PP1 that is contained in other resolutions that either recalls treaties to which not all states are party or that has states parties reaffirming their obligations pursuant to treaties to which they have become a party. There are a number of ways to remedy this paragraph, but we continue to find no flexibility on the part of co-sponsors to accommodate our concerns.

With respect to PP2, the United States believes that while the progressive realization of Economic, Social and Cultural rights requires government action, these rights are not an immediate entitlement to a citizen. Sovereign states should determine—through open, participatory debate and democratic processes—the combination of policies and programs they consider will be most effective in progressively realizing the needs of their citizens, including health care. We regret that this view was not articulated in the text.

PP27 opens with, "Stressing the importance of monitoring and analyzing the pharmaceutical and public health implication of relevant international agreements, including trade agreements. . . ." This language is vague and it is unclear who would do the monitoring and determine which trade agreements are relevant. Such vagueness creates the likelihood that unconstructive and invalid assessments of trade agreements would result. We do not, for example, believe it is appropriate for, or within the mandate of, the High Commissioner for Human Rights or the World Health Organiza-

tion to monitor trade agreements. We therefore cannot support such language and believe that this paragraph is inappropriate for this resolution.

There are numerous references in the text to “disabilities related to mental disorders.” There was considerable discussion during the negotiations of this resolution with a view to finding terminology that could receive wide support. Unfortunately, the co-sponsors were not willing to accept proposals that are grounded in accepted usage. We regret this was not possible.

PP6 welcomes the report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health and OP 19 decides to renew the mandate of the Special Rapporteur for three years.

We do not welcome the Special Rapporteur’s report and we do not support renewing his mandate, which we believe he has exceeded. In his report to the Commission this year, the Special Rapporteur treats public and private sector obligations as one and the same and fails to explain the relative responsibilities of the two spheres. The report also conflates the right of access to quality health care, an aspirational goal of a right to a healthy state of being, with rights to certain entitlements.

For these reasons, Mr. Chairman, my delegation asks that the adoption of this resolution be decided by a recorded vote.

## **2. UN General Assembly**

### **a. Millennium Development Goals**

In a letter of August 26, 2005, U.S. Permanent Representative to the United Nations Ambassador John Bolton explained the views of the United States on the issue of Millennium Development Goals in the context of preparation of the 2005 World Summit Outcome Document, discussed in Chapter 7.1.d. The full text of the letter, excerpted below, is available at [www.usunnewyork.usmission.gov/reform-un.htm](http://www.usunnewyork.usmission.gov/reform-un.htm). See also explanation of position on UNCHR resolution, “The Right to Education,” available at [www.humanrights-usa.net/2005/0414Item1023.htm](http://www.humanrights-usa.net/2005/0414Item1023.htm), also noting the distinction between

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goals in the Millennium Declaration and those from the Secretariat's report.

There has been some confusion in the press recently about the U.S. position on what are known as the "Millennium Development Goals" . . . .

As you recall, at the 2000 UN Millennium Summit, heads of state and government adopted the Millennium Declaration, which brought together a variety of development goals on poverty, hunger, education, health and environment. Some of these goals were original and some were from earlier conferences. The United States supports the achievement of these goals.

The next year, the Secretariat issued a report on the implementation of the Millennium Declaration. Based on the goals in the Declaration, the Secretariat formulated a package of goals and subsidiary targets and indicators, referring to them as "Millennium Development Goals." They are solely a Secretariat product, which member states never formally adopted.

Since then, the term "MDGs" has become ambiguous. Most people assume that the MDG targets and indicators were agreed in the Millennium Declaration. In fact, some of them are drawn from positions agreed by governments and others are simply Secretariat proposals.

The United States has, on many occasions, called attention to a particular problem with "MDG Goal Eight"—"Global Partnership for Development," and its various targets and indicators. For the most part, these targets and indicators refer to inputs rather than actual development goals and do not provide either an accurate or comprehensive picture of international support for development. Some, such as the measurement of ODA as a percentage of donor gross national income, have been explicitly rejected by the United States. The United States has consistently opposed numerical aid targets from their inception in the 1970s.

To avoid the ambiguity of the term "MDGs," UN member states have consistently agreed to use the formulation "internationally agreed development goals, including those in the Millennium Declaration" in negotiated texts. This spells out exactly what we

are committed to, and distinguishes the goals adopted by governments from the Secretariat product.

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***b. Right to development***

On December 13, 2005, Samuel Kotis, Adviser to the U.S. delegation, explained the U.S. decision to join consensus on draft resolution A/C.2/60/L.54, “Preventing and Combating Corrupt Practices and Transfer of Assets of Illicit Origin and Returning Such Assets, in Particular to Countries of Origin, Consistent with the United Nations Convention Against Corruption,” in the Second Committee, stating that

The United States aligns itself with the statement made by the European Union. In addition, in joining consensus on this resolution, the United States understands the term “right to development” to mean that each individual should enjoy the right to develop his or her intellectual or other capabilities to the maximum extent possible through the exercise of the full range of civil and political rights.

The full text of Mr. Kotis’s statement is available at [www.un.int/usa/05\\_243.htm](http://www.un.int/usa/05_243.htm). Summaries of the statement by the United Kingdom on behalf of the European Union (noting that it understood the title of the draft resolution to mean, inter alia, that, consistent with the UN Convention against Corruption, “assets of illicit origin derived from corruption should be returned to their rightful owners, which in many cases were likely to be the countries of origin”) and by the United States are available in U.N. Doc. A/C.2/60/SR.36 at 4, available at <http://documents.un.org/>.

In an explanation of the U.S. decision to join consensus on Women in Development, A/C.2/60/L.64, in the Second Committee on December 19, 2005, Laurie Lerner Shestack, member of the U.S. delegation, reiterated this position on the phrase “right to development” and stated further:

OP 14 [of Resolution A/RES/60/210] encourages governments and other bodies “to initiate positive steps to pro-

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mote equal pay for equal work or work of equal value.” The United States accepts “equal pay for equal work” but has concerns about “work of equal value.” There are no internationally agreed upon criteria to decide whether a particular form of work is “of equal value” to another.

The full text of Ms. Shestack’s remarks is available at [www.un.int/usa/o5\\_271.htm](http://www.un.int/usa/o5_271.htm).

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#### *c. Protection of migrants*

On November 23, 2005, the United States joined consensus on the adoption of UNCHR Resolution 2005/47, “Human Rights of Migrants,” in the UN General Assembly Third Committee (Social, Humanitarian and Cultural). In providing an explanation of position, Mariano Ceinos-Cox, a member of the U.S. Mission to the United Nations, stated as excerpted below. The full text of the statement is available at [www.un.int/usa/o5\\_231.htm](http://www.un.int/usa/o5_231.htm).

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. . . It is the responsibility of both the sending and receiving state to ensure the protection of human rights of migrants and to encourage the use of legal channels as they make their way from their country of origin and their country of destination. . . .

. . . [T]he United States recognizes the importance of securing its borders and enforcing its immigration laws through all lawful and appropriate approaches. Border control and the manner in which it is performed, and our interpretation of operative paragraph 20 [urging states to enforce border controls “only by means of duly authorized and trained government officials”] in no way compromises our ability to enact national legislation that would govern the conduct of private individuals or groups, which is essential to sovereignty. The United States already regulates the unlawful conduct of private individuals or groups, and will continue to work



in accordance to its national legislation and constitutional laws to this effect.

We continued to raise our concern in this resolution to the language of the preambular paragraphs 7 and 8, which take note of advisory opinions of a regional court and a recent judgment of the International Court of Justice. My delegation maintains that the documents referenced in these paragraphs are not relevant. Moreover, we believe that the ICJ's conclusions in the Avena judgment are substantively different from the conclusions of the Inter-American Court of Human Rights, in its Advisory Opinion 66-16/99, and it is therefore entirely inappropriate to note them, as they contribute nothing to this resolution. My delegation was disappointed our request to delete these references from the resolution was not able to be accommodated. The United States is fully aware of the obligations [of] states parties to the Vienna Convention on Consular Relations with regard to foreign nationals, we emphasize that these paragraphs, as well as Operative Paragraph 9, address treaty rights, not human rights.

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### **3. Organization of American States**

The United States was actively engaged in the negotiation of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families ("Program"), adopted by the General Assembly of the Organization of American States by consensus on June 7, 2005. AG/RES.2141 (XXXV-O/05). The Program, appended to the resolution, is set forth in detail under the headings Introduction (providing the Program background), Conceptual Framework, Description of the Program Implementers (including organs, agencies, and entities of the OAS, OAS member states, multilateral organizations, migrants, civil society organizations, and the Inter-American Institute of Human Rights), Program Objectives (provided in full below), Specific Activities (100 activities identified to specific implementers), Program Follow-Up Activities, and Human and Financial Resources.

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The Report of the Chair of the Working Group to Prepare the Program included the following:

The Permanent Mission of the United States, for its part, asked that the following statement be included in this report: "This document uses the word 'applicable' in several places to qualify international law or international legal instruments. The drafting group intended that 'applicable' excludes, for each Member State, provisions of international law that are not binding on that Member State, such as instruments to which that Member State is not party."

OAS Document CAJP/GT/TM-48/05 (May 20, 2005), available at [www.oas.org](http://www.oas.org). The full text of the resolution with appended Program is available in Proceedings of the Thirty-Fifth Regular Session of the Organization of American States General Assembly, Volume I, OEA/Ser.P/XXXV-O.2, [www.oas.org/juridico/English/ga05/ga05.doc](http://www.oas.org/juridico/English/ga05/ga05.doc), at 260-80. Excerpts follow.

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## II. CONCEPTUAL FRAMEWORK

Due to the increased scope and significance of migration in the last decade, virtually every state has become a sending, receiving, and transit country of migrants. As a result, migration has become a priority on the political and diplomatic agenda of many countries and of the Heads of State and Government at the Summits of the Americas. . . .

The goals of promoting and protecting the human rights of migrants are compatible with each OAS member state's sovereign rights to control its borders and enforce its laws. The Program therefore acknowledges the right of member states to regulate the entry and stay of foreigners in their territories and to determine the status of migrants and the effect of that status within the domestic political, legal, economic, and educational systems of receiving countries, as well as access to government services and benefits, in accordance with the legal framework of each country.

The states' authority to regulate the entry and stay of foreigners in their territories and to determine the status of migrants must be executed and be consistent with applicable international human rights and refugee law. At the same time, the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare of a democratic society.

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#### IV. PROGRAM OBJECTIVES

##### A. General Objectives

- Promotion and protection of the human rights of migrants, including migrant workers and their families, through, *inter alia*, the identification and implementation of cooperative actions and the exchange of best practices.
- Integration of considerations relating to the human rights of migrants and their families into the work of the organs, agencies, and entities of the OAS, taking into consideration a gender perspective.
- Linkage of the work of the organs, agencies, and entities of the OAS with the activities of states, multilateral organizations, and civil society, including the migrants themselves and their families.

##### B. Specific Objectives

1. Promotion of the exchange of best practices and cooperation among sending, transit, and receiving countries in order to fully respect and protect the human rights of all migrants, including migrant workers and their families.
2. Effective and efficient migration management, through the exchange of best practices with a view to achieving organized, fair, and controlled migration processes, which may constitute a factor in economic and social development and take family interests into account, including family reunification.
3. Promotion of international cooperation to deal with the diverse causes of migration, as well as its effects and impact on the sending, transit, and receiving societies.

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4. Attention to the special needs of vulnerable groups of migrants, including children, women, indigenous persons, persons of African descent, and persons with disabilities, among others.
5. Attention to the needs of persons in transit and receiving countries who may be vulnerable, such as low-income families and individuals, and persons living in regions, or working in economic sectors, with high proportions of migrants.
6. Prevention and technical cooperation in the fight against trafficking in persons, investigation and criminal prosecution of the persons responsible for this crime, and protection and assistance to victims of trafficking.
7. Prevention and technical cooperation in the fight against the smuggling of migrants, and investigation and criminal prosecution of migrant smugglers.
8. Promotion of orderly migration and support for migrant programs that permit social inclusion in the receiving countries, consistent with each state's domestic legal framework and applicable international human rights law.
9. Promotion of a more effective exchange of information on legislation and migration policies.
10. Education and dissemination of information on human rights, migrants' rights and responsibilities, and legal channels for migration and access to social services.
11. Promotion of activities against manifestations or acts of racism, racial discrimination, xenophobia, and related forms of intolerance against migrants, and recognition of the cultural and economic contributions made by migrants to receiving societies as well as to their communities of origin.
12. Strengthening of or participation in, as applicable, transnational networks and forums for dialogue among migrant organizations, and support for the work of multilateral entities and civil society organizations.
13. Inclusion of the human rights of migrants as a crosscutting issue in all the relevant activities undertaken by the OAS.
14. Promotion of public policies, facilitation of practices, and, when requested, advice on legislative issues aimed at the inclusion of migrants in the transit and receiving societies, consistent with each state's domestic legal framework and with

applicable international human rights law, with special emphasis on the rights related to health, education, labor, culture, nondiscrimination, and against violence, intolerance, racism, and xenophobia.

15. Development and support of programs for the reintegration of migrants and their families into the countries of origin.
16. Protection of the rights of migrants and their families under immigration proceedings, consistent with each state's domestic legal framework and applicable international human rights law, including the rights to a fair trial, protection from arbitrary arrest, due process of law, and equality before the law.
17. Information, notification, communication, and consular assistance, in accordance with the obligations of the states parties to the Vienna Convention on Consular Relations of 1963.
18. Facilitation of political participation by migrants and their families in their countries of origin.
19. Promotion of measures aimed at fulfilling the objectives of reducing the transfer costs of remittances.
20. Promotion and protection by states of origin of the human rights of the families of migrant workers who stay in their countries of origin, paying special attention to children whose parents have emigrated.

## **E. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

### **1. Report to the UN Committee Against Torture**

On May 6, 2005, the United States submitted its second periodic report to the UN Committee Against Torture, in keeping with the requirement for periodic reports in Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984). Excerpts follow from the introduction in Section I, and Sections II-IV. Annex 1, addressing U.S. practice with regard to detainees held in Guantanamo, Afghanistan, and Iraq, is discussed in Chapter 18.A.3.a.(1). The full text of the report, with seven annexes included as Section V, is available at

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*www.state.gov/g/drl/rls/45738.htm. See Digest 2000 at 372-88 for U.S. remarks on its initial report before the Committee Against Torture; Cumulative Digest 1991-1999 at 938-61 for adoption and implementation of the Torture Convention and submission of initial report.*

\* \* \* \*

3. The United States submitted its Initial Report to the Committee Against Torture in October 1999 (CAT/C/28/Add.5), hereafter referred to as "Initial Report". It made its oral presentation of that report to the Committee on May 10-15, 2000. Accordingly, the purpose of this Second Periodic Report is to provide an update of relevant information arising since the submission of the Initial Report.

4. Since the Initial Report, with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world. In fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S. Constitution, federal statutes, and international treaty obligations, including the Torture Convention.

5. The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances. On the United Nations International Day in Support of Victims of Torture, June 26, 2004, the President confirmed the continued importance of these protections and of U.S. obligations under the Torture Convention, stating:

. . . [T]he United States reaffirms its commitment to the worldwide elimination of torture. . . . To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. . . .

These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere. *See Annex 2.*

6. The United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a long-standing commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.

7. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.

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## **II. Information on New Measures and New Developments Relating to the Implementation of the Convention**

### Article 1 (Definition)

11. The definition of torture accepted by the United States upon ratification of the Convention and reflected in the understanding issued in its instrument of ratification remains unchanged. The definition of torture is codified in U.S. law in several contexts.

12. As explained in the Initial Report, this definition is codified at Chapter 113B of Title 18 of the United States Code, which provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the

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United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender. *See* 18 U.S.C. §§ 2340 and 2340A, as amended (the extraterritorial criminal torture statute), which is set forth in Annex 5. On October 26, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56, Title VIII, § 811(g), amended § 2340A to add an explicit conspiracy provision with strengthened penalties to the substantive offense described in the extraterritorial criminal statute. This prohibition on torture and conspiracy to torture extends, *inter alia*, to U.S. employees and U.S. contractors of the United States anywhere in the world outside of the United States, provided that the conduct falls within the enumerated elements of the statute. At the time of the enactment of 18 U.S.C. §§ 2340, 2340A, 18 U.S.C. § 2 already punished those who aid, abet, counsel, command, induce, procure or cause the commission of an offense against the United States.

13. On December 30, 2004 the Department of Justice's Office of Legal Counsel (OLC), which provides legal advice to the Executive Branch, published a memorandum that addresses the legal standards applicable under the extraterritorial criminal torture statute. This memorandum is available at Annex 3 and at <http://www.usdoj.gov/olc/dagmemo.pdf>. Under the language Congress adopted in enacting the statute, in order to constitute "torture" under § 2340–2340A, the conduct in question must have been "specifically intended to inflict severe physical or mental pain or suffering." The December 30, 2004 memorandum separately considers each of the principal components of that key phrase: (1) the meaning of "severe"; (2) the meaning of "severe physical pain or suffering"; (3) the meaning of "severe mental pain or suffering"; and (4) the meaning of "specifically intended." The memorandum supersedes an earlier memorandum of that same office in August 2002 on the same statute, discussing the definition of torture and the possible defenses to torture under U.S. law. The Department of Justice had previously withdrawn the August 2002 memorandum.

14. Torture is also defined in the immigration and extradition regulations that implement U.S. obligations under Article 3, as



discussed below. *See* 8 Code of Federal Regulations (C.F.R.) § 208.18(a) and 22 C.F.R. § 95.1(b).

15. The term “torture” is also defined in the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note, which, as discussed in greater detail in paragraph 82 below, permits victims of torture and extrajudicial killings to claim damages for such abuses.

#### Article 2 (Prohibition)

16. As indicated in the Initial Report, in the U.S. legal system, acts of torture are prohibited by law and contrary to U.S. policy, subject to prompt and impartial investigations, and punished by appropriate sanction. As noted above, the core legal framework through which the United States gives effect to its Convention undertakings to prevent acts of torture has not changed fundamentally since the Initial Report. As explained in the Initial Report, it is clear that any act of torture falling within the Torture Convention definition would in fact be criminally prosecutable in every jurisdiction within the United States. Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, an act of racketeering, or a criminal violation of an individual’s civil rights.

17. Since the Initial Report, the jurisdiction to prosecute torture as well as other serious abuses short of torture that are committed outside the United States has been expanded. The extraterritorial jurisdiction to prosecute torture and other serious abuses is discussed in greater detail under Article 5.

18. Throughout this report, we refer to numerous specific actions that the United States is taking to combat various forms of serious abuse. Although the examples cited throughout the report do not necessarily involve acts of torture as defined under Article 1 of the Convention, as ratified by the United States, or cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the Convention, as ratified by the United States, they are included to illustrate the commitment of the United States, or as the case may be, the sub-Federal level authorities in the United States,

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to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.

19. The United States is fully aware of allegations that U.S. military or intelligence personnel have subjected detainees in various locations to torture. Allegations with respect to the military are discussed in more detail in Annex 1 . . . Allegations regarding intelligence activities are currently under review by the Inspector General of the Central Intelligence Agency (CIA). That office has reported and will continue to report its findings to the Director of the Central Intelligence Agency and the Congressional Intelligence Oversight Committees and will continue to forward substantiated cases of abuse for investigation and prosecution to the Department of Justice.

20. Federal criminal prosecutions of complaints about abuse. Since the Initial Report, complaints about abuse including physical injury by individual law enforcement officers continue to be made and are investigated, and if the facts so warrant, officers are prosecuted by federal and state authorities. As described in the Initial Report, the Criminal Section of the Department of Justice's Civil Rights Division is charged with reviewing such complaints made to the Federal Government and ensuring the vigorous enforcement of the federal statutes that make torture, or any willful use of excessive force, illegal. The Department of Justice is committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations should action by the local and state authorities fail to vindicate the federal interest. Between October 1, 1999 and January 1, 2005, 284 officers were convicted of violating federal civil rights statutes. Most of these law enforcement officers were charged with using excessive force.

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### Article 3 (Non-refoulement)

30. The United States continues to recognize its obligation not to "expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture". The United States is aware of allegations that it has transferred individuals to third countries

where they have been tortured. The United States does not transfer persons to countries where the United States believes it is “more likely than not” that they will be tortured. This policy applies to all components of the United States government. The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances were not considered sufficient when balanced against treatment concerns, the United States would not transfer the person to the control of that government unless the concerns were satisfactorily resolved. The procedures for evaluating torture concerns in the immigration removal and extradition context are described in greater detail below.

\* \* \* \*

32. Observance of Article 3 obligations in the immigration removal context. As discussed in the Initial Report, regulations implementing Article 3 of the Torture Convention permit aliens to raise Article 3 claims during the course of immigration removal proceedings. These regulations fully implement U.S. obligations under Article 3 and set forth a fair and rule-bound process for considering claims for protection. Individuals routinely assert Article 3 claims before immigration judges within the EOIR, whose decisions are subject to review by the Board of Immigration Appeals, and ultimately, to review in U.S. federal courts. In exceptional cases where an arriving alien is believed to be inadmissible on terrorism-related grounds, Congress has authorized alternate removal procedures in limited circumstances that do not require consideration or review by EOIR. *See* INA § 235(c). The implementing regulations provide that removal pursuant to section 235(c) of the Act shall not proceed “under circumstances that violate . . . Article 3 of the Convention Against Torture.” *See* 8 C.F.R. 235.8(b)(4).

33. Article 3 protection is a more limited form of protection than that afforded to aliens granted asylum under the Immigration and Nationality Act (INA). This more limited form of protection is similar to withholding of removal, *see* INA§ 241(b)(3), through which the United States implements its non-refoulement obligations under the Refugee Protocol. An alien granted protection under the Torture Convention may be removed to a third country

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where there are no substantial grounds for believing that the alien will be subjected to torture. Furthermore, the regulations contain special streamlined provisions for terminating Article 3 protection for an alien who is subject to criminal and security-related bars, when substantial grounds for believing the alien would be tortured if removed to a particular country no longer exist. Finally, in a very small number of appropriate cases, pursuant to 8 C.F.R. § 208.18(c), the U.S. may consider diplomatic assurances from the country of proposed removal that the alien will not be tortured if removed there. In such removal cases, the Secretary of Homeland Security (and in cases arising prior to the enactment of the Homeland Security Act, the Attorney General), in consultation with the Department of State, would carefully assess such assurances to determine whether they are sufficiently reliable so as to allow the individual's removal consistent with Article 3 of the Torture Convention. The United States reserves the use of diplomatic assurances for a very small number of cases where it believes it can reasonably rely on such assurances that the individuals would not be tortured. Since the Initial Report, the United States has removed several individuals to their countries based on assurances that they would not be tortured. However, as is the case in the extradition context, the United States credits assurances and removes or extradites individuals only when it determines that it can remove or extradite a person consistent with its obligations under Article 3.

34. In practice, the record demonstrates that individuals seeking protection under Article 3 of the Torture Convention have asserted torture claims and in many cases have obtained protection under the regulations implementing the Convention. In the period from 1999, when the regulations implementing Article 3 of the Convention went into effect, through 2003, the available data indicates the following statistics regarding grants of protection by immigration judges based on the Torture Convention [showing a range of 519-546 per year during fiscal years 2000 through 2004].

35. However, these statistics do not convey the full extent to which U.S. law affords protection against return to individuals who "more likely than not" will be tortured upon their return. In light of the similarities between the harm feared by asylum and torture applicants, the same application form is used to request both

forms of protection and most individuals who assert torture claims simultaneously assert asylum claims. In such cases, if an individual is eligible for asylum, the immigration judge may grant asylum and thus not reach the torture claim. Accordingly, the statistics on grants of torture protection cited above may reflect cases where individuals were deemed ineligible for a grant of asylum by virtue of the bars to such relief (e.g., individuals who committed serious crimes) under U.S. law and U.S. obligations under the 1967 Protocol relating to the Status of Refugees or because they failed to demonstrate that the persecution feared would be “on account” of one of the protected grounds specified in the definition of “refugee” set forth at § 101(a)(42) of the Immigration and Nationality Act. Therefore, for a more complete understanding of the extent to which protection against return is afforded to aliens, it is relevant to note . . . available statistics on grants of asylum and withholding of removal.

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36. As the United States implements Article 3, the contours of elements unique to Torture Convention claims, such as the meaning of “torture” and government “acquiescence,” are taking shape in the United States through the development of interpretive case law. Since the Initial Report, there have been a number of precedent-setting decisions relating to Article 3 protection under the Torture Convention issued by the EOIR and by various federal district and circuit courts throughout the United States. Precedent administrative decisions by EOIR are available at [http://www.usdoj.gov/eoir/vll/intdec/lib\\_indecitnet.html](http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html), and include:

- Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (Applicant for Torture Convention protection must establish that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons who fear private entities that a government is unable to control.)
- Matter of G-A-, 23 I&N Dec. 366 (BIA 2002) (An Iranian Christian of Armenian descent demonstrated eligibility for Torture Convention protection by establishing that it is

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more likely than not that he will be tortured if deported to Iran based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and his drug-related convictions in this country. The evidence of record demonstrated that Armenian Christians were subject to harsh and discriminatory treatment in Iran, that persons associated with narcotics trafficking, like G-A, faced particularly severe punishment, and that Iranians who had spent an extensive amount of time in the United States were perceived to be opponents of the Iranian Government or even pro-American spies. The combination of these traits, and the evidence of widespread use of torture in Iran, demonstrated that the respondent was likely to be subjected to torture if deported to Iran.)

- Matter of J-E-, 23 I&N Dec. 291 (BIA 2002) (For an act to constitute “torture” it must satisfy each of the following five elements in the definition of torture set forth at 8 C.F.R. § 208.18(a): (1) the act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions. Neither the indefinite detention of criminal deportees by Haitian authorities nor the substandard prison conditions in Haiti constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally detain deportees or create and maintain conditions in order to inflict torture. Isolated instances of mistreatment that may rise to the level of torture as defined in the Torture Convention are insufficient to establish that it is more likely than not that the respondent will be tortured if returned to Haiti.)

37. Relevant decisions by federal courts on Article 3 claims are issued daily and are too numerous to list in this report. Generally, precedent decisions are publicly available on the Internet. Attached in Annex 6 is a sampling of federal court decisions on Article 3 claims.

38. The United States remains committed to providing Article 3 protection to all aliens in its territory who require such protection, and recognizes that there are no categories of aliens who are excluded from protection under Article 3. As such, some aliens who are subject to criminal- or security-related grounds and are thus ineligible for other immigration benefits or protection may be eligible for protection under Article 3. As described in paragraph 171 of the Initial Report, the United States provides a more limited form of protection—"deferral of removal"—to aliens otherwise subject to exclusion grounds. At the time the Initial Report was submitted, implementing regulations authorized continued detention of aliens granted deferral of removal. In 2001, the Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), discussed also in paragraph 132, that existing statutory authority under INA § 241(a)(6) to detain aliens with final orders of removal is generally limited to such detention as necessary to achieve removal in the reasonably foreseeable future. While the *Zadvydas* decision limits the authority of the Department of Homeland Security to detain certain aliens granted deferral of removal, DHS remains committed to ensuring the proper balance between United States obligations under the Torture Convention and DHS's mission to improve the security of the United States.

39. Observance of Article 3 obligations in the extradition context. As described in the Initial Report, in U.S. practice, an extradition judge's decision whether to certify extraditability is not dependent upon consideration of any humanitarian claims, including claims under the Torture Convention. After the Secretary of State receives a certification of extraditability from a magistrate or judge, the Secretary of State must determine whether a fugitive who has been found extraditable should actually be extradited to a requesting State. In determining whether a fugitive should be extradited, the Secretary of State is authorized to consider *de novo* any and all issues properly raised before the extradition court, as well as any other considerations for or against surrender, including whether it is more likely than not that the fugitive would face torture in the requesting State.

40. Pursuant to Department of State regulations set forth in the Initial Report, whenever allegations relating to torture are raised by



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the fugitive or other interested parties, appropriate policy and legal offices within the Department of State review and analyze information relevant to a particular case. Information provided by the relevant regional bureau, country desk, or U.S. embassy also plays an important role in the evaluation of torture claims. Based on the analysis of relevant information, the Secretary of State may decide to surrender the fugitive to the requesting State, deny surrender of the fugitive, or condition the extradition on the requesting State's provision of assurances, deemed to be credible by the Secretary of State, related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment, such as regular access to counsel. Whether such assurances are sought is determined on a case-by-case basis, fully bearing in mind U.S. obligations under Article 3 of the Torture Convention.

41. The Secretary of State will evaluate claims for protection under Article 3 of the Torture Convention after judicial extradition proceedings have been completed. This position is based on the longstanding "rule of non-inquiry," which leaves to the consideration of the Secretary of State questions regarding the treatment extraditees may receive following their surrender for extradition. In U.S. practice, the Secretary of State is uniquely well-suited to determine the risks that a fugitive would be subject to torture upon his return to a requesting state. In appropriate cases, it may be necessary for the Secretary of State to decide against surrender or to obtain assurances as necessary from the foreign government to persuade the Secretary of State that the United States would be acting in compliance with Article 3 of the Convention.

42. The issue of whether federal courts in the United States can consider an extradition fugitive's claims under the Torture Convention was litigated in *Cornejo-Barreto v. Seifert*. A panel of the United States Court of Appeals for the Ninth Circuit concluded that a fugitive facing extradition has a statutory right to judicial review of his claims under the Torture Convention, which attaches not during the extradition or habeas corpus proceedings, but after all the legal avenues are exhausted and the Secretary of State has signed the surrender warrant. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). A different panel of the Ninth Circuit subsequently rejected this conclusion and, in agreement with the posi-



tion of the Executive Branch, held that the Secretary of State's determination to extradite a fugitive is not subject to judicial review. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075, 1089 (9th Cir. 2004). A majority of the Ninth Circuit judges voted to rehear the case *en banc*, but prior to the date of the rehearing, the Mexican government withdrew its extradition request pursuant to the dismissal of the Mexican state prosecution that served as the basis for the request. Upon motion of the government, the Ninth Circuit then dismissed the case as moot and vacated the second panel decision. *Cornejo-Barreto v. Seifert*, 839 F.3d 1307 (9th Cir. 2004). In *Mironescu v. Costner*, 345 F.Supp. 2d 538 (M.D.N.C. 2004) a district court recently held that a petitioner could not seek habeas review, asserting a CAT Article 3 claim, when the Secretary of State had not yet determined whether to extradite the petitioner, but concluded that it was inappropriate, given the stage of the proceedings, to decide whether the petitioner could seek habeas review after the Secretary has made a determination to extradite.

43. Since enactment of the Department of State regulations, torture claims have been raised in less than 1% of extradition cases and surrender warrants have been issued in all cases. In some of those cases, it was determined that the evidence submitted by the claimants provided no basis to conclude that it would be more likely than not that the claimants would be tortured. In several cases, assurances, which were deemed adequate, were received from the requesting country.

Article 4 (Torture as a criminal offense)

44. [See paragraphs 12 and 16 above.]

Article 5 (Jurisdiction)

45. Since the submission of the Initial Report, two pieces of legislation, described below, were enacted that provide additional but distinct statutory bases for asserting jurisdiction over acts committed beyond the territory of the United States in addition to those discussed at paragraph 185 of the Initial Report. In addition to the extraterritorial criminal torture statute, which establishes extraterritorial jurisdiction over certain offenses involving torture, the statutes discussed below extend criminal jurisdiction over an array of offenses, which may include torture, when committed within the

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“Special Maritime and Territorial Jurisdiction of the United States” (SMTJ). *See* 18 U.S.C. § 7. As discussed in the Initial Report, certain provisions of the federal criminal code apply to acts taking place outside United States geographical territory, but which fall within the SMTJ.

46. On November 22, 2000, the President signed into law the “Military Extraterritorial Jurisdiction Act (MEJA),” codified at 18 U.S.C. §§ 3261 *et seq.* This statute extends criminal jurisdiction over certain categories of individuals for conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the SMTJ. As reflected in House Report No. 106-778(I) which was adopted by the House Judiciary Committee when it considered the statute, the background and purpose of the statute was to amend federal law to extend the application of its criminal jurisdiction to persons, including civilians, both United States citizens and foreign nationals, who commit acts while employed by or otherwise accompanying the U.S. Armed Forces outside the United States. It also extends federal jurisdiction to active duty members of the Armed Forces who commit acts while outside the United States, with one or more other defendants, at least one of whom is not subject to the UCMJ. *See* 18 USC 3261(d)(2). It also extends federal jurisdiction to former members of the Armed Forces who commit such acts while they were members of the Armed Forces, but who are not tried for those crimes by military authorities and later cease to be subject to the Uniform Code of Military Justice. Because many federal crimes, such as sexual assault, arson, robbery, larceny, embezzlement, and fraud, did not have extraterritorial effect, there was a “jurisdictional gap” that in many cases allowed such crimes to go unpunished. Although host nations have jurisdiction to prosecute such acts committed within their territory, they frequently declined to exercise jurisdiction when an American was the victim or when the crime involved only property owned by Americans. Accordingly, the statute was designed to close this gap by establishing a new federal crime involving conduct that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the U.S. As of January 1,

2005, there have been two prosecutions under MEJA, neither involving torture.

47. An additional legislative development that extended U.S. criminal jurisdiction extraterritorially was enacted on October 26, 2001, when the USA PATRIOT Act amended § 7 of Title 18 of the United States Code, which defines the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States. In pertinent part, a new paragraph 9 added to § 7 provides that, with respect to an offense that would otherwise apply within the SMTJ, committed by or against a national of the United States, premises of United States military or other United States Government missions or entities in foreign States are within the SMTJ. This paragraph, however, does not apply with respect to an offense committed by a person described in section 3261(a) of Title 18, United States Code, which codifies a provision of the Military Extraterritorial Jurisdiction Act described above.

48. The MEJA and SMTJ statutes each provide separate bases for asserting U.S. jurisdiction over extraterritorial crimes. Each statute was designed to address a different problem: MEJA was designed primarily to address the jurisdictional gap over civilians employed by, or accompanying, the armed forces overseas other than in times of a declared war; the expanded SMTJ in 18 U.S.C. §7(9), contained in the USA PATRIOT Act, was enacted as part of a comprehensive program to deal with the Global War on Terrorism. While neither statute was specifically designed to address torture, both statutes in fact complement the separate jurisdictional reach of the extraterritorial criminal torture statute. This is because, depending on the status of the offender or the victim, or the location of the offense, the U.S. may be able to assert jurisdiction over other crimes, which are related to torture, but may not meet the statutory elements of 18 U.S.C. §§ 2340 and 2340A, i.e. murder. It became apparent in 2004, however, that there was an unintended legislative anomaly to the enactment of 18 U.S.C. §7(9).

49. By expanding the territory within the SMTJ to include premises of United States military or other United States Government missions or entities in foreign States, the SMTJ statute had the effect of narrowing the reach of the extraterritorial criminal torture statute. The statute, by definition, only applies “outside the United

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States.” The term “United States” was originally defined as including “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title [Title 18 of the U.S. Code, § 7 of which defines the Special Maritime and Territorial Jurisdiction of the United States] and section 46501(2) of title 49.” Thus, when the USA PATRIOT Act expanded the SMTJ, the extraterritorial criminal torture statute no longer applied to areas included in the expanded SMTJ. This anomaly was corrected by § 1089 of the National Defense Authorization Act for Fiscal Year 2005 (NDAA05), which amended 18 U.S.C. §2340(3) to read as follows: “‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” By narrowing the definition of the United States, and making that definition part of the extraterritorial criminal torture statute, the reach of that statute is expanded prospectively, and the anomaly presented by the expansion of the SMTJ is now avoided. It also became apparent in 2004 that the MEJA statute did not cover situations involving contractors, unless they were employed by the Department of Defense. In October 2004, §1088 of the NDAA05 amended MEJA so that it covered a much broader group of contractors. 18 U.S.C. §3267’s definition of the term “employed by the Armed Forces outside the United States” in MEJA was amended to include “employees, contractors and subcontractors” of “any other Federal agency or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”

50. The extraterritorial criminal torture statute. As discussed above in paragraph 12, the USA PATRIOT Act amended the extraterritorial criminal torture statute, codified at 18 U.S.C. §§ 2340, 2340A, to also provide extraterritorial jurisdiction over conspiracy to commit such offenses. As of January 1, 2005, the United States has considered applying the statute in several cases, but it has not initiated any prosecutions under this provision to date. In some cases, investigations are pending. As is necessarily true of any successful criminal prosecution, the available evidence must establish the various elements of the offense. Accordingly, in order for the extraterritorial criminal torture statute to apply, the conduct must fall within the definition of torture, it must have been

committed subsequent to the effective date of the statute (November 20, 1994), and it must have been committed “outside the United States.”

51. The extraterritorial criminal torture statute is available to prosecute U.S. and foreign nationals “acting under the color of law,” provided that the enumerated elements of the offense are met. As a result of initial investigations in some cases, although criminal charges have not been brought under the extraterritorial criminal statute, immigration charges have resulted. Also, as discussed above, U.S. employees and contractors may also be subject to other criminal statutes governing their conduct extraterritorially, which apply in a broader range of circumstances than those described in the extraterritorial criminal torture statute. For example, depending on the circumstances, U.S. employees and contractors may be subject to those criminal statutes defining crimes within the SMTJ, which as discussed above in paragraph 47, generally includes overseas facilities (except for certain persons, such as members of the armed forces and those employed by or accompanying them, who are subject to MEJA or the United States Code of Military Justice). Those statutes defining crimes within the SMTJ prohibit, for example, assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111).

52. In the context of U.S. detention operations overseas, these criminal prohibitions may be available to prosecute abuses of detainees by particular members of the military (as noted, members of the military are also subject to the Uniform Code of Military Justice), intelligence and other non-military personnel. For example, on June 17, 2004, the Department of Justice announced that a contractor working for the Central Intelligence Agency had been indicted on charges stemming from the death of a prisoner in Afghanistan, Mr. Abdul Wali. The four-count indictment alleges that in June 2003 the contractor beat an Afghan prisoner who had surrendered voluntarily at the front of a U.S. detention facility near Asadabad in the northeast Kunar province of Afghanistan. The indictment includes two counts of assault causing serious injury and two counts of assault with a deadly weapon. Each count carries a maximum penalty of ten years in prison and a \$250,000 fine upon

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conviction. The indictment charges that the assaults occurred within the expanded SMTJ provided by 18 U.S.C. §7(9).

Article 6 (Detention and preliminary inquiry in cases of extradition) and Article 7 (Extradite or prosecute)

53. As described in the Initial Report, federal law and bilateral extradition treaties provide the legal basis by which the United States can either extradite or prosecute individuals alleged to have committed offenses involving torture, as required by Article 7 of the Convention. Acts which would constitute or involve the offense of torture, as defined under the Convention, and as interpreted by the understandings expressed by the United States at the time of ratification, are crimes under state or federal law, and subject to prosecution by the appropriate authorities. The crime of torture also continues to fall within the scope of extradition treaties concluded by the United States since the time of its Initial Report.

Article 8 (Extraditable offenses)

54. Consistent with Article 8 of the Convention, any act of torture within the meaning of the Convention continues to be an extraditable offense under relevant United States law and extradition treaties with countries that are also party to the Convention. The crime of torture continues to fall within the scope of extradition treaties concluded by the United States since the time of its Initial Report.

55. Since the Initial Report, the United States has received a small number of requests for extradition involving individuals wanted for serious human rights abuses or war crimes. Since October 1999, the United States extradited Elizaphan Ntakirutimana to the International Criminal Tribunal for Rwanda (ICTR), which had requested his extradition for genocide, complicity in genocide, and crimes against humanity.

Article 9 (Mutual legal assistance)

56. As discussed in the Initial Report, United States law permits both law enforcement authorities and the courts to request and to provide many forms of “mutual legal assistance” in criminal cases covered by the provisions of the Torture Convention.

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Article 11 (Interrogation techniques)

60. As described in the Initial Report, police interrogation of criminal suspects is strictly regulated by court-made rules based on constitutional law. As a result, the methods and practices of interrogation of criminal suspects and their treatment while in custody are routinely subject to judicial review and revision.

61. Concerns have been raised about what detention and interrogation practices were authorized on the basis of the memorandum drafted by the Department of Justice's Office of Legal Counsel in August 2002 interpreting the extraterritorial criminal torture statute (discussed at paragraph 13). On June 22, 2004, upon the release of numerous government documents related to interrogation techniques and U.S. laws regarding torture, then White House Counsel Alberto Gonzales stated the following:

"The administration has made clear before and I will re-emphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable."

62. Interrogation techniques employed by U.S. government personnel and contractors have been reviewed in light of the revised Department of Justice Office of Legal Counsel memorandum of December 30, 2004. *See* Annex 1.

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Article 15 (Coerced statements)

85. United States law continues to provide strict rules regarding the exclusion of coerced statements and the inadmissibility of illegally obtained evidence in criminal trials.



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86. Also, some states have taken steps recently to further protect the rights of the accused. In 2003, Illinois passed a crime law that requires police to videotape or audiotape questioning of suspects in homicide cases for the entirety of the interview. The reform measure joins Illinois with Alaska and Minnesota as the leading states to require such tapings.

#### Article 16 (Other cruel, inhuman or degrading treatment or punishment)

87. As the President of the United States explained on the United Nations International Day in Support of Victims of Torture, in addition to its commitment to investigating and prosecuting all acts of torture, the United States will “undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction.” *See* Annex 2.

88. In the United States a robust legal and policy framework operates to give effect to U.S. obligations under Article 16 of the Torture Convention. Article 16 requires that States parties act to “prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The particular undertakings of Article 16 are those specified in Articles 10-13, “with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.” As we did in the Initial Report, we note the reservation to Article 16 included by the United States in its instrument of ratification: “That the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” As described in the Initial Report, federal and state law provide extensive protections against conduct that may amount to cruel, inhuman or degrading treatment or punishment.



89. The Initial Report addressed a number of specific issues of concern where law enforcement authorities acted in a manner inconsistent with the legal framework described above. Many of the shortcomings described in the Initial Report continue to arise in particular instances. At the same time, however, U.S. law continues to provide effective mechanisms at the federal and state level to address such abuses and to prevent their recurrence.

90. As we noted earlier in paragraph 18, although the examples cited below in the discussion under Article 16, like other examples cited throughout the report, do not necessarily involve acts of torture as defined under Article 1 of the Convention, as ratified by the United States, or cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the Convention, as ratified by the United States, they are included to illustrate the commitment of the United States, or as the case may be, the sub-Federal level authorities in the United States, to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.

The report then addressed issues under the headings "Police brutality," "Conditions of confinement," "Sexual abuse of prisoners," "Restraint devices," "Detention of juveniles," "Care and Placement of Unaccompanied Alien Children," "Abuse of the institutionalized," "Prisoners on chain gangs," "Adult aliens in immigration custody," "Immigration detentions connected with September 11 investigations" (excerpted below), and "Capital punishment."

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134. Immigration detentions connected with September 11 investigations. In response to the attacks against the United States on September 11, 2001, the United States initiated an investigation to identify any accomplices to the terrorists who committed the September 11 attacks and to prevent a future attack. Department of Justice officials from numerous components, including employees of the Federal Bureau of Investigation (FBI), the former Immigration and Naturalization Service, the United States Marshals Service, the Bureau of Prisons, the Criminal Division, and many

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United States Attorney's Offices, along with officials at the state level, worked tirelessly to do everything within their legal authority to protect against another terrorist attack. As a result of the Federal Bureau of Investigation's (FBI) investigation, known as "PENTTBOM" (Pentagon Twin Towers Bombing), 762 aliens were detained on immigration charges after the attacks.

135. During the course of these detentions and in their aftermath, individual detainees, their families and human rights and immigrant rights groups asserted a broad range of allegations of abuses resulting from the investigations and detentions. These assertions included that individuals did not receive prompt notice of the charges on which they were being held, that they were deprived of procedural protections, that the immigration proceedings were closed to the public, and in some cases, that detainees were physically abused. Several lawsuits have been filed. At least one has been settled, while others are still pending.

136. On June 2, 2003, the U.S. Department of Justice Office of the Inspector General (OIG) issued a report entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." The report is available at <http://www.usdoj.gov/oig/special/0306/full.pdf>. The OIG undertook this investigation pursuant to its responsibilities under the Inspector General Act and pursuant to its responsibilities under the USA PATRIOT Act, section 1001 of which requires the OIG to designate an official to review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice. The report described DOJ's response to the attacks, including the PENTTBOM investigation. The OIG's report focused on the 762 aliens who were detained on immigration charges after the attacks. The report examined all aspects of the detainees' treatment, from the serving of the charging document to the policies governing the conditions of the detainees' confinement during their detention. Some of the detainees were held in Bureau of Prisons facilities, while others were held at INS detention centers or in state or local facilities under contract with INS. The report described the manner in which the BOP classified the detainees—initially putting them under its witness security

group—and the problems this created for those who attempted to communicate with them. The report made 21 recommendations to address the issues identified in the DOJ OIG review. The recommendations covered a broad range of issues, including, *inter alia*, the adoption of clearer and more objective criteria to govern arrests, the development of more effective means of coordination and communication between the various law enforcement agencies involved in such investigations, and the need for new standards governing conditions of detention.

137. Both the Department of Justice and the Department of Homeland Security have responded to the various recommendations identified by the Department of Justice's OIG. The respective responses of the agencies, as well as the analyses of such reports by the Department of Justice's OIG, are available at: [www.usdoj.gov/oig/special/0306/analysis.htm](http://www.usdoj.gov/oig/special/0306/analysis.htm) and <http://www.usdoj.gov/oig/special/0401/index.htm>. As evidenced by their responses to the OIG's report, in some cases the respective Departments adopted new policies, such as the adoption by the Department of Homeland Security's Immigration and Custom Enforcement (ICE) of a new detention standard on Staff-Detainee Communication. The central goal of this new standard is to ensure that ICE personnel monitor detention conditions and promptly address concerns that arise. The standard also includes specific timeframes during which officers must respond to certain enumerated detainee requests.

138. On December 18, 2003, DOJ's Office of Inspector General issued a supplemental report entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center (MDC) in Brooklyn, New York." This report is available at <http://www.usdoj.gov/oig/special/0312/final.pdf>. The report described the investigation conducted by the OIG concerning allegations that staff members of the Federal Bureau of Prisons' Metropolitan Detention Center in Brooklyn, New York physically and verbally abused aliens who were detained in connection with the terrorist attacks of September 11, 2001. It supplemented Chapter 7 of the June 2003 OIG report described above, in which the OIG found evidence that the conditions of detention at the MDC were excessively restrictive and unduly harsh. According to the OIG, those allegations included inadequate access to counsel, spo-

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radic and mistaken information to detainees' families and attorneys about where they were being detained, lockdown for at least 23 hours a day, cells remaining illuminated 24 hours a day, detainees placed in heavy restraints whenever they were moved outside their cells, limited access to recreation, and inadequate notice to detainees about the process for filing complaints about their treatment. In its June 2003 report, the OIG also noted that there was evidence that some MDC correctional officers physically and verbally abused some September 11 detainees, particularly during the months immediately following the September 11 attacks. The December 2003 supplemental report contained the results of the OIG's completed investigation into the allegations of abuse at the MDC. It recommended that the BOP consider taking disciplinary action against ten current BOP employees, counseling two current MDC employees, and informing employers of four former staff members about the OIG's findings against them. The Bureau of Prisons is continuing its investigation of the allegations of staff misconduct based on the OIG's report and recommendation and will consider appropriate action based on the results of that investigation.

139. Separate from the OIG's investigation into the MDC, allegations of abuse at the MDC were also investigated by the Bureau of Prisons' Office of Internal Affairs, the Department of Justice's Civil Rights Division and the United States Attorney's Office for the Eastern District of New York. Following a very thorough review, the Civil Rights Division and United States Attorney's Offices determined that there was no criminal conduct at the MDC facility. However, even if a matter is declined criminally at the Department of Justice, the OIG can continue that investigation to determine if there was misconduct that should result in disciplinary or other administrative action. In this case, the OIG did pursue the investigation as an administrative matter after prosecution was declined, and as noted above, the BOP Office of Internal Affairs is continuing its investigation into this matter.

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### III. Additional Information Requested By the Committee

143. By letter of May 21, 2004, the Committee requested “updated information concerning the situation in places of detention in Iraq, up to the time of the submission of the report.” This and other relevant information regarding U.S. military operations is provided in Annex 1 for the Committee’s review.

### IV. Observations on the Committee’s Conclusions and Recommendations

144. The United States has carefully considered the Committee’s Conclusions and Recommendations. Observations of the United States on those conclusions and recommendations appear below.

**The Committee expressed concern over “The failure of the State Party to enact a federal crime of torture in terms consistent with Article 1 of the Convention.”**

145. As was discussed in considerable detail in the Initial Report, every act of torture within the meaning of the Convention, as ratified by the United States, is illegal under existing federal and/or state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes at either the state or federal level. While the specific legal nomenclature and definitions vary from jurisdiction to jurisdiction, it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States. The United States appreciates many merits in the suggestion advanced by the Committee. However, as the United States substantively has fulfilled the requirements of the Convention in this respect and for the reasons it determined to apply at the time it became party to the Convention, the United States has decided to retain the current statutory regime within the United States on this point.

**The Committee expressed concern over “The reservation lodged to Article 16, in violation of the Convention, the effect of which is to limit the application of the Convention.”**

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146. The Committee's use of the phrase "in violation of the Convention" is confusing as a matter of international treaty law. By their nature, reservations alter the scope of treaty obligations assumed by State Parties. Accordingly, reservations that are not prohibited by a treaty or by the applicable international law rules relating to reservations are not violations of that treaty. As the Torture Convention does not prohibit the making of a reservation and as the reservation in question is not incompatible with the object and purpose of the Convention, there is nothing in the U.S. reservation that would be unlawful or otherwise constitute a violation of the Convention.

147. The decision by the United States to condition its ratification upon a reservation to Article 16 (construing its obligations under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment" only insofar as the term means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the U.S. Constitution) was made after careful deliberation. Indeed, the existence of this reservation was a critical element in the decision by the United States to become a State Party to the Convention. The rationale set forth in the Initial Report, in particular the vague and ambiguous nature of the term "degrading treatment," remains equally valid at this time.

**The Committee expressed concern over "The number of cases of police ill-treatment of civilians, and ill-treatment in prisons (including instances of inter-prisoner violence). Much of this ill-treatment by police and prison guards seems to be based upon discrimination."**

148. Please see discussion under under Article 2 and Article 16 above. In a country of some 280 million people with a prison population of over 2 million people it is perhaps unavoidable, albeit unfortunate, that there are cases of abuse. Continuing U.S. efforts to deal with these problems and punish perpetrators of such acts are set out throughout this report. The United States fully agrees that the rights of detainees should be protected, in particular against unlawful discrimination.

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The Committee expressed concern over “The legal action by prisoners seeking redress, which has been significantly restricted by the requirement of physical injury as a condition for bringing a successful action under the Prison Litigation Reform Act.”

153. The Prison Litigation Reform Act of 1996 (PLRA), which was enacted as part of Pub. L. 104-134, contains several provisions designed to curtail frivolous lawsuits by prison inmates. One such provision is the requirement that no action shall be brought with respect to prison conditions under federal law by a prisoner until such administrative remedies as are available are exhausted. Another is the provision that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury. Courts of appeals have held that the physical injury requirement does not prevent a prisoner from obtaining injunctive or declaratory relief. E.g., *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). Moreover, the “physical injury” requirement has been challenged in U.S. courts and its constitutionality has been upheld. Since their enactment in 1996, the statutory amendments provided by the PLRA have achieved their fundamental purpose of restricting frivolous lawsuits by inmates that were disrupting the efficient operation of the federal judicial system.

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#### RECOMMENDATIONS:

**“enact a federal crime of torture in terms consistent with Article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention.”**

155. As described above, the United States respectfully disagrees with the Committee regarding the necessity and advisability of enacting a new federal crime of torture when existing U.S. law already provides that every act of torture within the meaning of the

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Torture Convention, as ratified by the United States, is prohibited by criminal law under existing federal and/or state law.

156. The United States respectfully reminds the Committee that the United States reached its conclusion that it would be necessary to condition U.S. ratification of the Convention on certain reservations, understandings and declarations as a result of a serious and careful review of U.S. law. The Initial Report sets forth the rationale for each of those reservations, understandings and declarations. While the United States has considered its existing reservations, understandings, and declarations in light of the Committee's recommendation, there have been no developments in the interim that have caused the United States to revise its view of the continuing validity and necessity of the conditions set forth in its instrument of ratification.

**“take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification.”**

157. Much of this report has described actions taken within the United States that are consistent with this recommendation. The United States Government is aware of continuing allegations of specific types of abuse and ill-treatment in particular cases. The United States believes that, overall, the country's law enforcement agencies and correctional institutions set and maintain high standards of conduct for their officers and treatment for persons in their custody. The United States believes that there is a deterrent effect on prospective individual conduct due to the successful federal and state criminal prosecutions of law enforcement officers who are responsible for abuse. It also realizes that such conduct has not been eradicated and that its efforts in this regard must continue.

158. The discussion under Article 2 above provides accounts of examples of the Department of Justice's efforts to prosecute law enforcement officers for misconduct, as exemplified by the 284 convictions of law enforcement officers for violating federal civil rights statutes between October 1, 1999 and January 1, 2005. When sufficient evidence of a violation of an individual's constitutional rights is established, such cases are prosecuted by the Federal Government



and substantial sentences are adjudged. Please refer also to the discussion under Article 16 above regarding police brutality and the action taken to remedy such abuses. In addition to federal law enforcement efforts, local and state prosecutions are also brought.

159. Recognizing that female offenders have different social, psychological, educational, family, and health care needs than male offenders, the Bureau of Prisons continues to design and implement special programs for women offenders. However, the BOP treats all inmates, male and female, in a firm, fair, and consistent manner, with a primary focus being the maintenance of the inmates' dignity and humanity. Prospective employees undergo a rigorous pre-employment screening and background check to ensure the highest standards of integrity. Once employed, staff receive initial training and refresher training at least annually throughout their careers regarding the importance of proper treatment of inmates, and appropriate boundaries between staff and inmates.

160. Despite these measures, there have been unfortunate instances where staff have violated these standards of trust. Federal law expressly criminalizes sexual activity between correctional workers and inmates in federal prisons. Every allegation is investigated thoroughly. In cases where an allegation of inappropriate conduct by a staff member towards an inmate is substantiated, offending staff are referred for prosecution, to eradicate this deplorable behavior. Examples of prosecutions of such conduct are provided in the discussion under Article 16 above.

**“Abolish electro-shock stun belts and restraint chairs as methods of restraining those in custody; their use almost invariably leads to breaches of Article 16 of the Convention.”**

161. The policies regarding the use of restraint chairs adopted by the Department of Justice reflect an awareness that the use of restraint chairs and stun belts, while lawful, should nevertheless be carefully circumscribed. The Bureau of Prisons' use of restraint chairs is intended only for short-term use, such as transporting an inmate on or off of an airplane. In the course of several investigations, the Civil Rights Division of the Department of Justice has investigated the use of the restraint chair in non-federal jails and prisons. The Civil Rights Division has recommended that such de-

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vices should only be used to keep an inmate from hurting himself or others, when less restrictive means of controlling the inmate have failed. The use of such devices should be carefully controlled and the inmate should be monitored at least every 15 minutes, vital signs should be checked and opportunities for movement, eating, and toileting should be provided. Restraints should be removed as soon as the inmate is no longer a threat to himself or others.

162. In the course of its investigations of adult correctional facilities, juvenile correctional facilities and law enforcement agencies pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA) and the Pattern or Practice of Police Misconduct provision of the Crime Bill of 1994, described above, the Civil Rights Division has recommended limitations on the use of electro-shock weapons in both law enforcement agencies and corrections facilities, as well as increased training for officers using such weapons. However, the per se use of such restraints does not violate constitutional standards. Used appropriately, stun belts, stun guns, certain types of choke holds, and pepper spray can be effective tools for law enforcement under certain conditions where use of force is warranted due to the actions of a suspect whom the police are justifiably attempting to detain or arrest and in the correctional setting. In particular, these devices sometimes can be used as effective alternatives where more serious or deadly force would otherwise be justified. In the corrections setting, medical screening is required to determine if use of stun devices and pepper spray is contraindicated.

#### **“Consider declaring in favor of Article 22 of the Convention.”**

163. At the time it undertook its domestic procedures to become a State Party to the Convention, the United States Executive and Legislative Branches gave substantial thought to the question of whether to avail the United States of the procedure set forth in Article 22. Since receiving the Committee’s recommendation, the United States has further considered whether to make a declaration recognizing the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by the United States. While noting that at any time it could decide to reconsider the issue, the United States continues to decline to make such a declaration. As has been

discussed at considerable length throughout this report, the United States legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations. Accordingly, the United States will continue to direct its resources to addressing and dealing with violations of the Convention pursuant to the operation of its own domestic legal system.

**“Ensure that minors (juveniles) are not held in prison with the regular prison population.”**

164. As stated under Article 16 above, in federal prisons, juveniles are not regularly held in prison with the regular prison population. Federal law prohibits juvenile offenders held in custody of federal authorities from being placed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. See 18 U.S.C. § 5039. When a juvenile must be temporarily detained in an adult facility, it is for a minimal period of time and “sight and sound” separation from the adult offenders is ensured within the institution. The Bureau of Prisons has less than 300 juvenile offenders in its custody, and all such offenders are housed in contract facilities. All juvenile offenders in BOP custody are required to receive 50 hours per week of quality programming (e.g., GED, drug treatment, sex offender treatment, violent offender treatment).

165. The United States appreciates this opportunity to update its Initial Report on the operation of the Convention within the United States and looks forward to further work with the Committee Against Torture on these important issues.

**2. Statements to OSCE Human Dimension Implementation Meeting**

On July 15, 2005, Robert Harris, Assistant Legal Adviser for Human Rights and Refugees, addressed the Supplemental Human Dimension Meeting in Vienna, on preventing torture in the war against terrorism. Mr. Harris’s remarks, excerpted below, are available at [http://osce.usmission.gov/archive/2005/07/SHDM\\_Session2\\_07\\_15\\_05.pdf](http://osce.usmission.gov/archive/2005/07/SHDM_Session2_07_15_05.pdf).

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As a preliminary matter, it is not correct to say that the United States has abandoned the rule of law in its response to the armed attacks against it by Al Qaeda and its affiliates. On the contrary, the United States is profoundly committed to the rule of law and to abide by its national laws and the commitments it has assumed under international law. This is particularly true with respect to obligations we have assumed with regard to torture.

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It is easy for legal discussions about the U.S. war against Al Qaeda and its affiliates to become confused by failure to recognize that the United States is engaged in a literal—not rhetorical—war against Al Qaeda and its affiliates. In 1996, Osama bin Laden issued a fatwa declaring war against the United States. In the following years, Al Qaeda attacked the U.S. embassies in Kenya and Tanzania, as well as military targets, killing more than 200 people. The horrific events of September 11 are well known, resulting in the death of over 3,000 people from 98 nations.

After these attacks against innocent civilians, the World Trade Center and the Pentagon, the international community acted decisively to affirm that the United States was fully within its legal rights to respond under the law of war to an armed attack against it. This was decided by the UN Security Council, by all 19 NATO member countries, by the members of the Organization of American States under the Rio Treaty, and by Australia, citing the ANZUS Treaty.

In October 2001, exercising its right of self-defense, the U.S. government began formal military action against terrorists and the Taliban harboring them in Afghanistan. By any measure, this was an armed conflict. The detainees at Guantanamo are combatants in the war against Al Qaeda and the Taliban. Under the international law of war, the United States has the right to hold combatants for the duration of hostilities. This has long been recognized as necessary to prevent combatants from rejoining the fight.

In conducting this war, the United States has never waived from its categorical and longstanding opposition to and prohibi-

tion of torture. Torture is *never* acceptable in wartime or in peacetime.

Under U.S. law, any U.S. citizen engaging in torture anywhere in the world—indeed any torturer found in the United States—is subject to criminal prosecution. This includes contractors of the United States Government.

At the highest levels of government, torture has been condemned as an affront to human dignity and the rule of law. Under U.S. law, as reflected in Article 15 of the Convention Against Torture, the information elicited by torture is not admissible in criminal proceedings and, as recently confirmed by the U.S. Attorney General, has not been relied upon for any purpose.

Consistent with Article 3 of the Convention Against Torture, the United States does not transfer people to countries where it believes it is more likely than not that the person will be tortured. This policy applies to all components of the U.S. Government.

The United States is not only committed to oppose torture and prosecute torturers, the United States is also committed to the obligations it has assumed to prevent cruel, inhuman or degrading treatment or punishment. Returning to the question of detainees, the U.S. armed forces are committed to treat all detainees humanely and not subject them to physical or mental abuse or cruel treatment.

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Finally, I would note that our commitment to the rule of law cannot ensure that people in custody will never be abused. No country is perfect, and the discussion should recognize this unfortunate fact. However, states that believe in rule of law can and must ensure that perpetrators of abuse are brought to justice. Pictures at Abu Ghraib reflect truly reprehensible acts. Abuse of prisoners has also occurred in Afghanistan and Guantanamo. These acts are reprehensible. Pursuant to the operation of law in the United States, people who have engaged in such abuse are being, and will be, held accountable.

On September 22, 2005, Frank Gaffney, Office of Human Rights and Refugees in the Office of the Legal Adviser, addressed the OSCE Human Dimension Implementation Meeting on the prevention of torture. Mr. Gaffney's statement, excerpted

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below, is available at [http://osce.usmission.gov/archive/2005/09/HDIM\\_On\\_Prevention\\_of\\_Torture\\_09\\_22\\_05.pdf](http://osce.usmission.gov/archive/2005/09/HDIM_On_Prevention_of_Torture_09_22_05.pdf). See also statement on protection of torture victims, available at [http://osce.usmission.gov/archive/2005/09/HDIM\\_On\\_Protection\\_of\\_Torture\\_Victims\\_09\\_22\\_05.pdf](http://osce.usmission.gov/archive/2005/09/HDIM_On_Protection_of_Torture_Victims_09_22_05.pdf).

The United States is unequivocally opposed to the use and practice of torture, and fully supports OSCE's work in the fields of torture prevention. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.

All components—and I emphasize this: all components of the U.S. Government must act in compliance with the law, including all U.S. constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply to employees both within the United States and throughout the world. We have moved aggressively to hold accountable those responsible for the abuse of detainees wherever they are held in U.S. custody pursuant to the global war on terrorism. When allegations of torture or other unlawful treatment arise, they are investigated and, if substantiated, prosecuted. Investigations of alleged abuse of detainees in custody are ongoing.

The United States has discussed our position on torture at several OSCE meetings this year. . . .

We believe other States should also make their positions clear and respond openly to criticisms raised here and in other OSCE fora.

. . . [I]n April, the OSCE Mission in Tbilisi hosted a meeting on Georgia's National Action Plan Against Torture, which was developed with assistance from the OSCE. We welcome Georgia's continued engagement on this issue and commend Georgia for amending the Criminal Procedure Code in April. The amended

Code stipulates that statements given during pre-trial detention must be confirmed by the defendant in court to be accepted as evidence. This is a confirmed best practice for preventing torture.

We also commend Georgia for prosecuting more police officers for their torture-related crimes or other illegal conduct and for issuing updates on measures to combat abuse in the justice system. Clearly, much can be accomplished when there is political will. Of course, more remains to be done, and we urge Georgia to implement some of the specific recommendations that have been produced at international consultations. These include:

- Maintain accurate and complete records on every person who has access to a detainee, including during interrogation.
- When there is credible evidence that a law enforcement officer has committed torture or abuse, the officer should immediately be suspended from active duty, while the case is investigated.
- Consider establishing an independent body to monitor investigations into torture allegations carried out by the procuracy.

... [T]hese recommendations are valid for all OSCE participating States, and ODIHR's experts are available to assist States who want to implement them. We urge participating States to take advantage of this resource.

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## **F. GENOCIDE, CRIMES AGAINST HUMANITY, AND RELATED ISSUES**

### **1. Responsibility to Protect**

As discussed in Chapter 7.A.1.e.(2)(ii), the United States supported inclusion of language addressing the international responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity in the 2005 World Summit Outcome Document. A fact sheet commenting on the Outcome Document as adopted, released by the Department of State on October 7, 2005, stated: "In the

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wake of Srebrenitza, Rwanda, and Darfur, the United States believes this statement is an important step towards stopping such deliberately-caused suffering.” The full text of the fact sheet is available at [www.state.gov/p/io/fs/57527.htm](http://www.state.gov/p/io/fs/57527.htm).

### 2. UN Commission on Human Rights

On April 20, 2005, the United States joined consensus and supported adoption of Resolution 2005/62, “Prevention and Punishment of Genocide,” stating that “we believe that the prevention and punishment of genocide is an urgent matter that must remain at the top of the international community’s agenda[;]. . . disturbingly, the threat of genocide continues to be a threat in the 21st century.” The full text of the U.S. statement is available at [www.humanrights-usa.net/2005/0420Item17EOP.htm](http://www.humanrights-usa.net/2005/0420Item17EOP.htm). The U.S. statement did, however, note its remaining concerns with paragraph 5 of the resolution, encouraging “greater efforts to achieve wide ratification of the Rome Statute” establishing the International Criminal Court. *See* Chapter 3.C.2.(a)(2). *See also* Chapter 3.C.2.(a)(1) concerning the referral of the situation in Darfur to the ICC.

On April 8, 2005, Senator Rudy Boschwitz, head of the U.S. delegation, condemned the “situation of human rights in Sudan, especially in Darfur,” as “the most egregious example of human rights abuse in the world at this moment.” Senator Boschwitz’s statement, urging the UNCHR to take “clear and forceful action” on the crisis in Darfur is excerpted below and available at [www.humanrights-usa.net/2005/0408Sudan.htm](http://www.humanrights-usa.net/2005/0408Sudan.htm). The United States joined consensus on Resolution 2005/82, “Situation of human rights in the Sudan,” on April 21, 2005; *see* statement by Senator Boschwitz, available at [www.humanrights-usa.net/2005/0421sudan.htm](http://www.humanrights-usa.net/2005/0421sudan.htm).

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The United States applauds the many efforts to help rectify the situation in Darfur. Foremost, the Security Council has acted to provide the framework for peace. The African Union has become critically involved in Darfur, both to facilitate peace talks, and to



promote a ceasefire. We must continue to be supportive of their actions to protect innocent individuals in Darfur.

But progress remains marginal, peace remains elusive and the humanitarian situation precarious. We are all called to help, not just in responding to the need for food, medicine, shelter and security, but also in the vital necessity of restoring respect for human rights in Darfur.

What needs to be done?

Foremost, the government of Sudan must accept its responsibility, cease attacks on innocent civilians and implement its obligation to disarm and disband the Janjaweed.

Secondly, impunity must end. Those, from either side of the conflict, who have committed war crimes must be held accountable for their actions.

Third, security must be improved in and around the camps for displaced persons.

Fourth, additional efforts need to be devised so women and girls need not fear rape or violence.

Fifth, civil society institutions, including traditional tribal governing institutions, must be afforded a political environment in which they can work and flourish.

... This commission can help by going unequivocally on the record with the strongest possible resolution that accurately documents the situation in Darfur. Such a resolution would delineate the problem, give heart to those who need our understanding, authorize additional international attention, and compel those in authority to respond positively and immediately.

The Commission on Human Rights cannot leave here, the 61st Session must not close, without expressing itself in the strongest possible terms about the most flagrant and egregious violations of human rights that presently exists in the world.

## **G. DETENTIONS AND MISSING PERSONS**

### **1. Disappearances Convention**

On September 23, 2005, at the conclusion of the final session of the UNCHR Intersessional Open-ended Working Group

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on a draft legally binding normative instrument for the protection of all persons from enforced disappearances, the Working Group concluded its work and transferred to the Commission on Human Rights for consideration the draft International Convention for the Protection of All Persons from Enforced Disappearances. Doc. No. E/CN.4/2005/WG.22/WP.1/REV.4, available with related documents at [www.ohchr.org/english/issues/disappear/group/index.htm](http://www.ohchr.org/english/issues/disappear/group/index.htm). The United States provided a statement noting its concerns with certain aspects of the draft instrument, excerpted below. The full text of the U.S. remarks is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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As the task of the Working Group draws to a close and responsibility is passed to the Human Rights Commission to consider further work, we express sincere appreciation to the Chair and his team, including the Secretariat . . .

We also commend the State delegations, the independent experts, the ICRC, and non-governmental organizations . . . and give special thanks to the families of the disappeared for bearing witness to this terrible scourge.

At the same time, as we have said before, in order to produce a document that will attract the widest possible number of states parties, treaty negotiations should be deliberate, unhurried, and careful, allowing for full expression of views by all representatives, with every effort to achieve a consensus text that can be applied in all legal systems. We regret that often the pace of negotiations, among other factors, has resulted in a document that includes provisions the United States does not support, and to which we have registered key reservations. These reservations include, but are not limited to the following:

Preambular paragraph 7 and Article 24(2) on the Right to the Truth. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in Article 19 of the ICCPR, consistent with our long-standing position under the Geneva Conventions. We are grateful for the good will shown in seeking compromise language in the Preamble, but our reservations

remain concerning this issue, including with respect to Article 24(2), which we read in this same light.

We have serious concerns about Article 2\* which we firmly believe needs a more focused definition that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work.

Article 5 requiring domestic legislation criminalizing crimes against humanity remains insufficiently defined and inappropriate to an operative paragraph in the text.

As we have noted, the lack of a defense of superior orders in Article 6(2) could unfairly subject unwitting military and law enforcement personnel to the possibility of prosecution for actions that they did not and could not know were prohibited.

Despite some modifications, the specific requirements for a statute of limitations in Article 8 continue to present a problem of implementation within a Federal system like that of the U.S. Likewise, Article 4 should not be read to require our various domestic legal systems to enact an autonomous offense of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States.

We also note that our continuing objection to Article 9(2)\*\* concerning “found in” jurisdiction has not been satisfactorily addressed.

We have clearly stated for the record our continuing reservation to the absence of language in Article 16 explicitly conforming this text to the principle of non-refoulement articulated in the 1951 Refugee Convention.

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\* Editor’s note: Article 2 provides: “For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

\*\* Article 9.2. provides: “Each State Party shall . . . take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”

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We find that Article 17 concerning access to places of detention, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some state parties.

Finally, we remain unconvinced that the appropriate vehicle for implementation of this instrument is a new treaty monitoring body.

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On April 20, 2005, the United States provided an explanation of its decision to join consensus on Resolution 2005/27, "Enforced or involuntary disappearances," as set forth in full below.

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The United States was pleased to join consensus on this resolution addressing the serious problem of forced disappearances. With respect to the instrument being drafted on the disappearances issue, the United States Government supports treaty negotiations that are conducted in one annual two-week formal session, which provides for transparency and inclusiveness of all negotiating partners. The objective must be to produce a well-drafted, well-vetted instrument that reflects consensus, without deadlines for completion of negotiations.

With respect to the resolution itself, the United States does not interpret the disappearances resolution as an attempt to restate or affect provisions of the law with regard to detention.

### 2. Right to the Truth Resolution

On April 20, 2005, the UNCHR adopted Resolution 2005/66, "Right to the truth," without a vote. The United States provided an explanation of its decision to join consensus, set forth below in full.

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The United States is pleased to join consensus on this resolution on the right to truth, which may be characterized differently in various legal systems, such as our own, as the right to be informed or freedom of information or the right to know. . . . With regard to the right to know, the U.S. position has not changed since the ICRC

Conference on the Missing in February 2003 as well as the 28th ICRC/Red Cross Conference in December 2003. That is, the United States is committed to advancing the cause of families dealing with missing persons; however, we do not acknowledge any new international right or obligation in this regard. At the December 2003 ICRC/Red Cross Conference, my government acknowledged that a “right to know” is referred to in Article 32 of the 1977 Additional Protocol I to the Geneva Conventions, but for the United States, which is not a party to that instrument, it is only “in the spirit” of that Article that families be informed of the fate of their missing family members. Furthermore, as noted the United States has not adopted Protocol I of the Geneva Conventions, and therefore, has no obligations with respect to any “right to truth” under that instrument.

## **H. JUDICIAL PROCEDURE, PENALTIES, AND RELATED ISSUES**

### **1. Death Penalty**

#### ***a. U.S. death penalty for minor offenders held unconstitutional***

On March 1, 2005, the U.S. Supreme Court held that “[t]he Eighth and Fourteenth Amendments [of the U.S. Constitution] forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.” *Roper v. Simmons*, 543 U.S. 551 (2005). After reviewing precedents in the area of capital punishment, the Court affirmed a decision from the Missouri Supreme Court setting aside a death sentence against a person who was 17 at the time he committed a murder. In recent years U.S. Supreme Court decisions had prohibited the imposition of the death penalty on offenders under the age of 16 at the time of the crime (*Thompson v. Oklahoma*, 487 U.S. 815 (1988)), but had found that the death penalty for 16- and 17-year old juvenile offenders was not unconstitutional (*Stanford v. Kentucky*, 492 U.S. 361 (1989)). It had also determined that execution of the mentally retarded constituted cruel and unusual punishment (*Atkins v.*

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Virginia, 536 U.S. 304 (2002)), overturning its 1989 decision to the contrary (*Penry v. Lynaugh*, 492 U.S. 302 (1989)).

Excerpts follow from the Court's analysis in deciding to overturn its precedent in *Stanford*, including its examination of foreign and international law. Four justices dissented from the Court's holding, strongly disagreeing with its constitutional analysis. A dissenting opinion written by Justice Scalia (joined by Justices Rehnquist and Thomas) also rejected the Court's reliance on foreign and international law.

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[II.] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (*per curiam*); . . . As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." . . . By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion).

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. . . The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures

that have addressed the question. This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

III.A. The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313-315, 153 L. Ed. 2d 335, 122 S. Ct. 2242. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. 536 U.S., at 316, 153 L. Ed. 2d 335, 122 S. Ct. 2242. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. . . . In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that “[w]e ought not be executing people who, legally, were children.” . . . By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

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. . . As noted in *Atkins*, with respect to the States that had abandoned the death penalty for the mentally retarded since *Penry*, “[i]t is not so much the number of these States that is significant, but the

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consistency of the direction of change.” 536 U.S., at 315, 153 L. Ed. 2d 335, 122 S. Ct. 2242. In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. 536 U.S., at 315-316, 153 L. Ed. 2d 335, 122 S. Ct. 2242. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation . . . , and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects. . . .

Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U. N. T. S. 171 (entered into force Mar. 23, 1976), it did so subject to the President’s proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. . . . This reservation at best provides only faint support for petitioner’s argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. See 18 U.S.C. § 3591. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society.



B. A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson*, 487 U.S., at 856, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (O'Connor, J., concurring in judgment). Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." . . .

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." . . .

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . .

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. . . .

\* \* \* \*

In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. 487 U.S., at 833-838, 101 L. Ed. 2d 702, 108 S. Ct. 2687. We conclude the same reasoning applies to all juvenile offenders under 18.

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." . . . Whether viewed as an attempt to express the community's moral outrage or as

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an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument.

\* \* \* \*

IV. Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop [v. Dulles]*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 2 L. Ed. 2d 630, 78 S. Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins, supra*, at 317, n. 21, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson, supra*, at 830-831, and n. 31, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund, supra*, at 796-797, n. 22, 73 L. Ed.2d 1140, 102 S. Ct. 3368 (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe");

*Coker, supra*, at 596, n. 10, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (plurality opinion) (“It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”).

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468-1470 (entered into force Sept. 2, 1990); . . . No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at \_\_\_\_, 161 L. Ed. 2d, at 20); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.

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The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: “[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusuall Punishments inflicted.” 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1770); see also *Trop, supra*, at 100, 2 L. Ed. 2d 630, 78 S. Ct. 590 (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), 193, p 44. Parliament then enacted the Children and Young Person’s Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See *The Federalist* No. 49, p 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees

are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

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***b. Statement at OSCE Human Dimension Implementation Meeting***

On September 23, 2005, Frank Gaffney, Office of Human Rights and Refugees in the Office of the Legal Adviser, delivered a response to comments in the OSCE Human Dimension Implementation Meeting, held in Warsaw from September 19-30, 2005, criticizing the U.S. use of the death penalty. Mr. Gaffney's remarks are set forth below and are available at [http://osce.usmission.gov/archive/2005/09/HDIM\\_On\\_Prevention\\_of\\_Torture\\_09\\_22\\_05.pdf](http://osce.usmission.gov/archive/2005/09/HDIM_On_Prevention_of_Torture_09_22_05.pdf).

The United States appreciates the opportunity to respond to comments in this forum criticizing U.S. use of the death penalty; criticism that comes despite the fact that the United States continues to fully respect its obligations under international law as well as its domestic Constitutional, legal obligations.

The European Union has chosen to abolish the death penalty within its sphere. The United States has chosen not to do so. This is the political reality. We are democracies. Government does not exist independent of the people it serves, but derives its power and its legitimacy from the people. The use of the death penalty in the United States is a decision left to democratically elected governments at the federal and individual state levels. The people of the United States, acting through their freely elected representatives, have chosen not to abolish the death penalty.

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International law does not prohibit capital punishment. The International Covenant on Civil and Political Rights specifically recognizes the right of countries to impose the death penalty for the most serious crimes, carried out pursuant to a final judgment rendered by a competent court and in accordance with appropriate safeguards and observance of due process. The U.S. judicial system provides an exhaustive system of protections to ensure that the death penalty is not applied in an extra-judicial, summary or arbitrary manner.

The operation of such judicial safeguards is demonstrated most recently by the ruling issued in March of this year by the U.S. Supreme Court, banning the execution of those who were under the age of 18 at the time of their crime. In previous rulings, the U.S. Supreme Court has also prohibited execution of the mentally retarded and the insane.

Madam Moderator, the issue of the imposition of the death penalty continues to be the subject of vigorous and open discussion among the American public.

### 2. Right to a Remedy

On April 19, 2005, Paula Barton, U.S. Mission to the UN in Geneva, delivered an explanation for the U.S. decision to abstain from voting on adoption of the Basic Principles and Guidelines on the Right to a Remedy at the UN Commission on Human Rights. The full text of the statement is set forth below.

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The United States delegation regrets that it is compelled to call for a vote on adoption of the Basic Principles and Guidelines on the Right to a Remedy, as this non-binding instrument embodies respect for the rule of law and the principle of accountability for gross human rights violations and serious violations of the law of armed conflict. The document is an important statement condemning impunity and underscoring the importance of righting legal wrongs—both essential principles in a democracy—and thus the document merits our support. We note the important provisions in the Principles recognizing that international human rights law and international human-

itarian law are separate bodies of law, as well as the provision stating that the Principles are without prejudice to special rules of international law. We also underscore that the Principles create no legal obligations and are phrased in a manner that provides wide flexibility to states in considering modalities and mechanisms for implementing existing international law obligations applicable to each state. We express our sincere appreciation to the Government of Chile for these provisions. However, we regret that, after much discussion, we were unable to reach accommodation on our oft-repeated request for neutral text on the International Criminal Court in [preambular paragraph] 5 and for this reason are constrained to call for a vote on the resolution and instrument and to abstain. In this regard we underscore that non-parties to the ICC Treaty have no legal obligations in connection with that treaty, unless otherwise directed by the UN Security Council.

At the Third Committee of the UN General Assembly in November 2005, the United States joined consensus on adopting the guidelines. In an explanation of its position, the United States repeated the points made at the UNCHR and underscored “the important provision in the Principles recognizing that international human rights law and international humanitarian law are separate bodies of law and the provision stating that the Principles are without prejudice to special rules of international law.” *See also* Chapter 3.C.2.a.(2) for explanation of U.S. concerns with references to the ICC.

### **3. Impunity**

On April 21, 2005, Leonard A. Leo, U.S. public delegate, provided an explanation of the U.S. position in joining consensus on Resolution 2005/81, “Impunity,” at the UNCHR. Mr. Leo’s statement noted U.S. concerns with language concerning the ICC contained in the resolution and stated that “we join consensus this year, with the expectation that Member States will respect the spirit of multilateral cooperation in the future by forging a resolution that does not, through its references to the Rome Statute, create controversy and divisiveness over an issue where none need exist.” *See* Chapter 3.C.2.a.(2) for discussion of

the ICC and related issues. Mr. Leo's remarks are available in full at [www.humanrights-usa.net/2005/0421Item17.htm](http://www.humanrights-usa.net/2005/0421Item17.htm).

#### 4. Extrajudicial, Summary, and Arbitrary Executions

Also on April 21, Mr. Leo provided an explanation of the U.S. decision to abstain from the vote on UNCHR Resolution 2005/33, "Extrajudicial, Summary, and Arbitrary Executions." Mr. Leo's remarks, set forth below, are available at [www.humanrights-usa.net/2005/0421Item11.htm](http://www.humanrights-usa.net/2005/0421Item11.htm).

The United States abhors and condemns in the strongest possible terms all truly extrajudicial, summary or arbitrary executions or killings. Our Constitution, in a number of respects, contains provisions directed at preventing such practices. Both our national government, and the government of the states, are prohibited from denying anyone life or liberty "without due process of law." Consistent with these provisions and others in our Constitution affording criminal defendants the right to counsel, guaranteeing the right of trial by jury, and requiring states to guarantee the equal protection of the laws to all citizens, the United States criminal justice system supplies unparalleled procedural protections. A vast array of national, state, and local laws further direct law enforcement to carry out their responsibility to investigate cases of extrajudicial or arbitrary killings in a nondiscriminatory manner, and, when law enforcement engages in abusive tactics itself, the United States has laws in place to prevent impunity. In these and other ways, the American legal system recognizes the inherent dignity and worth of all people.

We very much appreciate the changes that the sponsors of the Resolution have made to the original text in an effort to secure consensus. Unfortunately, there are several remaining problems with the text that the United States cannot ignore.

For many years, Special Rapporteurs in this area have unilaterally expanded and interpreted their mandate as set forth by the Commission. That is why we requested, in what is now Paragraph 13, that the Special Rapporteur do his work "strictly within the framework of the mandate established by the Commission itself." This proposal was not accepted by the sponsors.



The United States also must underscore that, while we fully agree with the thrust of Paragraph 11, the Standard Minimum Rules for the Treatment of Prisoners constitute only a recommendation. They are not binding on Member States.

We also note that several paragraphs in the Resolution unacceptably blur the historically rooted and logical distinction between human rights law and international humanitarian law, while other paragraphs simply misrepresent the current state of international humanitarian law. Paragraph 7, for example, does not carefully delineate the circumstances where human rights law and international humanitarian law might apply, and the paragraph confusingly treats police, government officials, and military personnel in the same breath. This is not helpful guidance to the international community. In a similar vein, the Resolution fails to address directly the problem of intentional attacks against civilians in armed conflict situations by speaking in unnecessarily generalized and overbroad terms.

The United States already has noted as well its concern with Paragraph 5, which dilutes the forcefulness of the Resolution's effort to protect all persons from arbitrary killings by singling out or highlighting a couple of groups, and with Paragraph 9, which addresses the International Criminal Court.

## **5. Alien Tort Statute and Torture Victim Protection Act**

The Alien Tort Statute ("ATS"), also often referred to as the Alien Tort Claims Act ("ATCA"), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It currently provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." Over the past several decades, the statute has been interpreted by the federal courts in various human rights cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). By its terms this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act ("TVPA") was enacted in 1992 and is codified at 28 U.S.C. § 1350 note. It provides a cause of action in federal courts against "[a]n individual . . .

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[acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains a ten-year statute of limitations.

### **a. Alien Tort Statute**

#### **(1) Presbyterian Church of Sudan v. Talisman Energy, Inc.**

In 2003 the U.S. District Court for the Southern District of New York denied a motion to dismiss claims brought under the ATS by nationals of Sudan against Talisman, a Canadian energy company, and the Republic of Sudan. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). See *Digest* 2003 at 383-84. As described by the court in that case

... Plaintiffs claim that Talisman, a large Canadian energy company, collaborated with Sudan in “ethnically cleansing” civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities. . . . This policy of “ethnic cleansing” was aimed at non-Muslim, African residents of southern Sudan, and entailed extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians.

On June 13, 2005, the district court denied a motion filed by Talisman for judgment on the pleadings, in which Talisman argued that intervening decisions by the Supreme Court and the Second Circuit Court of Appeals render the 2003 decision’s recognition of corporate liability and secondary liability (conspiracy and aiding and abetting) erroneous. 374 F. Supp. 2d 331. Excerpts below describe the status of the case and the court’s conclusion (footnotes omitted).

The plaintiffs are current and former residents of southern Sudan who allege that they were victims of genocide, crimes against humanity, and other violations of international law perpetrated by the Canadian energy company Talisman Energy, Inc. (“Talisman”) and the Government of Sudan (“Sudan”). . . .

\* \* \* \*

In the 2003 Opinion, the Honorable Allen G. Schwartz held, among other things, that corporations may be held liable under international law for violations of *jus cogens* norms, *Presbyterian Church*, 244 F. Supp. 2d at 319, and that international law recognizes theories of liability such as conspiracy and aiding and abetting (collectively, “secondary liability”), *id.* at 321-22. In so holding, the 2003 Opinion noted that the Second Circuit had frequently confronted ATS cases involving corporate defendants and had never found itself to lack jurisdiction because corporations could not be liable under international law. *Id.* at 308-13. That Opinion also noted that other circuits, as well as numerous district courts, had confronted ATS cases involving corporate defendants, and that no federal court decision could be found holding that corporations could not be liable under international law. *Id.* at 313-15. The 2003 Opinion further cited international law supporting corporate liability, including International Military Tribunal decisions from Nuremberg, *id.* at 315-16, international treaties, *id.* at 316-17, resolutions of international organizations such as the United Nations Security Council, *id.* at 318, and decisions of the European Court of Justice, *id.*

Regarding international law’s recognition of theories of liability such as conspiracy and aiding and abetting, the 2003 Opinion cited International Military Tribunal decisions from Nuremberg, *id.* at 322, international criminal statutes, *id.* at 322-23, international treaties, *id.* at 323, and decisions of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, *id.* at 323-24. The 2003 Opinion also cited Second Circuit and district court cases indicating that conspiracy and aiding and abetting are actionable under the ATS. *id.* at 320-21.

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In its motion for judgment on the pleadings, Talisman contends that the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004), and the Second Circuit's decision in *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003), have so changed the landscape of law governing ATS lawsuits that the 2003 Opinion was clearly erroneous for two reasons. First, Talisman claims that *Alvarez-Machain*, which held that federal courts should not recognize ATS claims for violations of international law norms "with less definite content and acceptance among civilized nations than the historical paradigms familiar" when the ATS was enacted, *Alvarez-Machain*, 124 S. Ct. at 2765, requires a finding that corporate liability and secondary liability are not sufficiently definite and accepted in international law to support an ATS claim. Second, Talisman claims that *Flores*, which held that determining the content of customary international law requires looking to "concrete evidence of the customs and practices of States," *Flores*, 406 F.3d at 82, renders the sources consulted in the 2003 Opinion no longer authoritative, and requires a finding that there is insufficient evidence to support the existence of corporate liability and secondary liability under international law.

\* \* \* \*

After reviewing Talisman's arguments, the court concluded that the intervening cases cited by Talisman did not affect its analysis in the 2003 opinion. Among other things, the court noted that, as to corporate liability for violations of *jus cogens* norms, in this case,

[Canada] has transmitted a letter via the U.S. Department of State to this Court expressing political concerns about the foreign policy implications of exerting extraterritorial jurisdiction over a Canadian corporation based on events occurring in Sudan. Pointedly, Canada has not objected to the notion that customary international law provides for corporate liability for violations of *jus cogens* norms. Indeed, Talisman has not cited a single case where any government objected to the exercise of jurisdiction over one of its national corporations based on the principle that it is not a violation of international law for corporations to

commit or aid in the commission of genocide or other similar atrocities. . . .

The Canadian views referred to by the district court were set forth in a diplomatic note dated January 14, 2005, submitted to the court in a Statement of Interest filed by the United States in March 2005. The note accompanied an attached letter from the U.S. Department of State Legal Adviser William H. Taft, IV, dated February 11, 2005. In its March 5, 2005, Statement of Interest, the United States informed the court

(1) of concerns expressed by the United States Department of State as to the effect of the above-referenced matter on this Nation's foreign affairs, especially in light of the Government's understanding that Canada's judiciary is equipped to consider claims such as those raised here; and (2) of concerns expressed by the Government of Canada about the exercise of extraterritorial jurisdiction by this Court over the Canadian defendant Talisman Energy Inc. in this matter, which the Government of Canada states, among other things, frustrates its policies *vis a vis* Sudan.

The views of the United States Department of State are set forth in a letter from [the] U.S. Department of State Legal Adviser. . . . As the Supreme Court has directed, it is appropriate for this Court to give these concerns great weight "as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255 (2004).

Excerpts from Mr. Taft's February 11 letter follow (footnotes deleted).

The full text of the Statement of Interest, with attachments, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The August 25, 2004, U.S. brief as *amicus curiae* in *Doe v. Unocal*, in the Ninth Circuit, also annexed to the Statement of Interest with reference to aider and abettor liability is excerpted in *Digest 2004* at 365-76.

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In its diplomatic note, presented to the Department of State on January 14, 2005, the government of Canada formally conveyed its view that the exercise of jurisdiction in this suit “constitutes an infringement in the conduct of foreign relations by the Government of Canada” and “creates a ‘chilling effect’ on Canadian firms engaging in Sudan and the ability of the Canadian government to implement its foreign policy initiatives through the granting and denial of trade support services.” In this regard, the note expressed the concerns of the government of Canada over the possible impact of this litigation on Canadian efforts to promote “the peaceful resolution of Sudan’s internal disputes.” The government of Canada also objected to the exercise of jurisdiction under the Alien Tort Statute to “activities of Canadian corporations that take place entirely outside the US.”

The United States shares with the government of Canada a profound abhorrence of the numerous and intolerable human rights violations and other atrocities that have taken place in Sudan over many years. This Administration has been working actively and directly with the government of Sudan and with the international community for several years to bring an end to the decades-old conflict in southern Sudan and to bring relief to the many thousands of victims of that conflict. . . .

The Department of State takes no position on the merits of the pending litigation but shares the government of Canada’s concern about the difficulties that can arise from an expansive exercise of jurisdiction by the federal courts under the ATS. As explained by the U.S. Government in its brief to the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. \_\_\_, 124 S.Ct. 2739 (2004), nothing in the ATS or its history suggests that it was intended to open U.S. courts to suits between aliens arising from conduct taking place entirely in other countries. Under prevailing concepts of sovereignty at the time the ATS was originally adopted in 1789, foreign states would have considered it an intolerable interference in their internal affairs for U.S. courts to adjudicate the rights and obligations of their own nationals with respect to conduct occurring wholly within their own boundaries, and relating to persons with no connection to the United States, just as the United States would have balked at similar efforts by foreign courts to adjudicate the rights and obligations of

U.S. citizens with respect to conduct occurring wholly within the United States and relating to persons with no connection to the adjudicating state. There is good reason to believe that in enacting the ATS Congress intended to empower U.S. courts to address and resolve only a limited class of disputes affecting the rights of aliens within the United States for acts taking place within the United States, and for the specific purpose of avoiding, rather than provoking, conflicts with foreign nations. *Cf.* the so-called *Marbois* incident of May 1784, discussed in the *Sosa* opinion at 124 S.Ct. 2757. We believe the statute should be interpreted and applied today in a manner consistent with what the Supreme Court in *Sosa* described as the “restrained conception” reflected in the original statute (*id.* at 2744).

These concerns about the proper scope of the statute’s application are particularly salient when, as here, a foreign government has interposed a specific and strong objection to a civil proceeding brought in U.S. court against its nationals by third country nationals regarding conduct that took place entirely outside the United States. When the subject matter of the proceeding has little or no nexus with the United States, when the government in question claims regulatory and jurisdictional competence over its nationals and the conduct in question, and when that government’s legal system warrants U.S. respect (as Canada’s does), these concerns may be even stronger.

Moreover, when the government in question protests that the U.S. proceeding interferes with the conduct of its foreign policy in pursuit of goals that the United States shares, we believe that considerations of international comity and judicial abstention may properly come into play.

In *Sosa*, the Supreme Court interpreted the statute to encompass a “narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs” if they remained unremedied. *Id.* at 2756. In articulating general standards for this purpose, the Court said that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted” (*id.* at 2765). In this connection, the Court specifically

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referred to the statute's historical antecedents (the "violation of safe conducts, infringement of the rights of ambassadors, and piracy") and cautioned courts to exercise "an element of judgment about the practical consequences of making [a specific] cause available to litigants in the federal courts" (*id.* at 2766).

\* \* \* \*

On August 31, 2005, the district court dismissed a further motion by *Talisman* for judgment on the pleadings. 2005 U.S. Dist. LEXIS 18399 (Aug. 31, 2005). In rejecting arguments based on the political question doctrine or undue interference, the court concluded:

*Talisman* is . . . at pains to identify United States foreign policies towards Sudan with which this action interferes, other than to speculate more generally about its effects on efforts to promote peace in Sudan. Moreover, . . . neither the Statement [of Interest] nor the [Department of] State Letter contend that this case will impact on United States foreign policy towards Sudan or Canada.

The court's rejection of the doctrine of international comity in this opinion is discussed in Chapter 15.D.1.a.(3).

#### (2) In re Apartheid Litigation

On October 14, 2005, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit in *South African Apartheid Litigation* supporting affirmance of the district court opinion on appeal. In that case, a different judge of the Southern District of New York had declined to follow the decision in *Talisman*, *supra*, finding instead that "the ATCA presently does not provide for aiding and abetting liability and this Court will not write it into the statute." *South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). *See Digest 2004* at 354-61.

Excerpts below from the U.S. amicus brief provide its views that the district court correctly found no jurisdiction over aiding and abetting liability claims under the ATS, particularly in this case involving claims "centering on the



mistreatment of foreign nationals by their own government.”  
(most footnotes omitted). The full text of the brief is available  
at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

As the Supreme Court recently recognized, if improperly construed or applied, the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, could improperly impinge upon the “discretion of the Legislative and Executive Branches in managing foreign affairs.” *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004). Thus, the United States has a very substantial interest in the proper construction and application of the statute.

\* \* \* \*

ALLEGATIONS OF AIDING AND ABETTING OTHERS’ MIS-  
CONDUCT ARE NOT ACTIONABLE UNDER THE ATS.

A. The Court Should Be Very Hesitant To Apply Its Federal  
Common Law Powers To Resolve A Claim Centering On The  
Treatment of Foreign Nationals By Their Own Government.

Under the ATS, although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law—i.e., the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under—and thus governed by—U.S. law. In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the South African people by the apartheid regime previously controlling that country. It would be extraordinary to give U.S. law an extraterritorial effect in such circumstances to regulate conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.

When construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in for-

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eign nations, including disputes between such nations and their own citizens. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). This presumption “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Ibid.* Notably, the same strong presumption existed in the early years of this Nation, and, significantly, even the federal statute that defined and punished as a matter of U.S. law one of the principal law of nations offenses—piracy—was held not to apply where a foreign state had jurisdiction. *See United States v. Palmer*, 16 U.S. 610, 630-631 (1818) (the federal piracy statute should not be read to apply to foreign nationals on a foreign ship). *See also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, except so far as its own citizens.”); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807) (general statutory language should not be construed to apply to the conduct of foreign citizens outside the United States). The view of that time is reflected by Justice Story:

No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns \* \* \*. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. *No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.*

*United States v. La Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (emphasis added).

Plaintiffs cite Attorney General Bradford’s opinion from 1795. That opinion noted the availability of ATS jurisdiction for offenses on the high seas in 1795, but also explained that insofar “as the transactions complained of originated or took place in a foreign country, *they are not within the cognizance of our courts.*” *See* 1 Op. Att’y Gen. 57, 58 (1795) (emphasis added).

While the *Sosa* Court concluded that Congress, through the ATS, intended the federal courts to have a limited federal common law power to adjudicate well-established and defined international law claims, the Court expressly questioned whether this federal common law power could properly be employed “at all” in regard to disputes between a foreign nation and its own citizens. *Sosa*, 124 S.Ct. at 2763. Indeed, given the accepted principles of the time, it is highly unlikely that the drafters of the ATS intended to grant the newly created federal courts unchecked power to apply their federal common law powers to decide extraterritorial disputes regarding a foreign nation’s treatment of its own citizens. Nothing in the ATS, or in its contemporary history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded and motivated the enactment of the ATS involved conduct purely within the United States. *See id.* at 2756-2657.

Moreover, “those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations.” *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). The point of the ATS was to ensure that the National Government would be able to afford a forum for punishment or redress of violations for which the nation offended by conduct against it or its nationals might hold the United States accountable. A foreign government’s treatment of its own nationals is a matter entirely distinct and removed from these types of concerns.

Against this backdrop, reinforced by caution recently mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law powers to resolve claims, such as the ones here, centering on the mistreatment of foreign nationals by their own government. The fact that plaintiffs have sued corporate defendants does not alter these concerns. The fact remains that these claims turn upon the acts of the previous South African Government and would require a U.S. court to pass judgment on the acts of a foreign nation against its own citizens.

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B. The Significant Policy Decision To Impose Aiding And Abetting Liability For ATS Claims Should Be Made By Congress, Not The Courts.

As the Supreme Court has held, the creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without Congressional direction, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.

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C. Practical Consequences Counsel Against The Adoption Of Aiding And Abetting Liability Under The ATS.

Under *Sosa*, a court deciding whether to adopt a federal common law rule extending aiding and abetting liability under the ATS must also consider the potential practical consequences, including the foreign policy effects of such a ruling. *See* 124 S.Ct. at 2766 (“the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts”); *id.* at 2766 n.21 (in discussing other possible limiting principles, the Court stated, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”). Those consequences strongly counsel against the judicial creation of aiding and abetting liability for ATS claims.

1. One of the “practical consequences” of embracing “aiding and abetting” liability for ATS claims would be to create uncertainty that would in some instances interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty concerning private liability, which would surely deter many businesses

from such economic engagement. Even when companies are not party to or directly responsible for the abuses of an oppressive regime, they would likely become targets of ATS aiding and abetting suits, and the fact-specific nature of an aiding and abetting inquiry would expose them to protracted and uncertain proceedings in U.S. courts. *Cf. Central Bank of Denver*, 511 U.S. at 188-189.

While the benefits of constructive engagement strategies have been debated for many years, such foreign policies have been employed by the United States in the past, such as with regard to the South African apartheid regime, at issue in this case, and China. The policy determination of whether to pursue a constructive engagement policy is precisely the type of foreign affairs question that is constitutionally vested in the Executive Branch and over which the courts lack institutional authority and ability to decide. *See Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936); *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003).

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In the case of South Africa, at issue here, the United States employed both engagement and sanctions in the effort to end apartheid. The policy of economic constructive engagement included use of “U.S. influence to promote peaceful change away from apartheid.” National Security Decision Directive 187 at 1. Methods used to achieve that goal included increased funding of educational, labor, and business programs. *Id.* at 2. Also, U.S. businesses were urged to “assist black-owned companies.” *Ibid.*

While employing the policy of constructive engagement, the United States also, by Executive Order, and then by statute, strongly condemned the practice of apartheid and prohibited the “making or approval of any loans by financial institutions in the United States to the Government of South Africa or to entities owned or controlled by that Government,” and “[a]ll exports of computers, computer software, or goods or technology intended to service computers to or for use by” specified entities of the South African government. This mix of engagement and limited sanctions was part of carefully crafted political and diplomatic efforts to encourage the Government of South Africa to end apartheid. *See Pub.*

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L. 99-440, §§ 4, 101. A court 20 years after the fact should not employ its common law powers to sit on judgment on whether this policy was in hindsight the best course of action. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (refusing to review the propriety of foreign policy decisions made by the U.S. Government in the 1970s).

Importantly, the adoption of an aiding and abetting rule in this case could prospectively restrict policy options for the United States around the world. Adopting aiding and abetting liability under the ATS would undermine the ability of the Executive to employ an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices. The selection of the appropriate tools, and the proper balance between rewards and sanctions, requires difficult policymaking judgments that can be rendered only by the federal political branches. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 375-385 (2000).

2. Another important practical consideration is that allowing for the proliferation of ATS suits through adoption of an aiding and abetting liability standard would inevitably lead to greater diplomatic friction for the United States. Aiding and abetting liability under the ATS would trigger a wide range of ATS suits with plaintiffs challenging the conduct of foreign nations—conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act (“FSIA”).<sup>8</sup> Aiding and abetting liability would afford plaintiffs the ability to, in effect, challenge the foreign government’s conduct by asserting claims against those alleged to have aided and abetted the government.

Experience has shown that aiding and abetting ATS suits often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). This serious diplomatic friction

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<sup>8</sup> Under the FSIA, foreign governments are immune from suit, subject to certain specified exceptions. For tort claims, foreign governments generally cannot be sued unless the tort occurs within the United States. *See* 28 U.S.C. 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-41 (1989).

can lead to a lack of cooperation on important foreign policy objectives.

In this specific case, as the district court noted, the “South African government indicated that it does not support this litigation and that it believes that allowing this action to proceed would preempt the ability of the government to handle domestic matters and would discourage needed investment in the South African economy.” *In re: South African Apartheid Litigation*, 346 F.Supp.2d 538, 553 (S.D.N.Y. 2004). The statement of interest filed by the United States Government “expressed its belief that the adjudication of this suit would cause tension between the United States and South Africa.” *Id.* at 553. In accord with *Sosa*, 124 S.Ct. at 2766 n. 21, the district court then properly gave great weight to these specific foreign policy statements, as well as to the Executive Branch’s view as to broader foreign policy ramifications of recognition of aiding and abetting liability under the ATS.

3. Aiding and abetting liability can also have a deterrent effect on the free flow of trade and investment more generally, because of the uncertainty it creates for those operating in countries where abuses might occur. The United States has a general interest in promoting the free flow of trade and investment, both into and out of the United States, in order to increase jobs domestically and the standard of living overseas. Apart from this national economic interest, the U.S. has broader foreign policy interests in using trade and investment to promote economic development in other countries as a way of promoting stability, democracy and security.

Thus, serious foreign policy and other consequences relating to U.S. national interests strongly counsel against the adoption of a rule extending civil aiding and abetting liability to ATS claims.

D. Civil Aiding And Abetting Liability Does Not Satisfy *Sosa*’s Threshold Requirement That An International Law Norm Be Both Firmly Established And Well Defined.

Under *Sosa*, whatever other considerations are relevant in determining whether an international law norm should be recognized and enforced as part of an ATS federal common law cause of action, a necessary requirement is that the international law principle must be both sufficiently established and well defined. The Su-



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preme Court did not provide any definitive methodology for assessing when international law norms meet these standards. The Court explained, however, that the principle at issue must be both “accepted by the civilized world” and “defined with a specificity,” and in both respects the norms must be “comparable to the features of the 18th-century paradigms”—i.e., violation of “safe conducts, infringement of the rights of ambassadors, and piracy.” See *Sosa*, 124 S.Ct. at 2761-62. Thus, in resolving whether the necessary conditions are met, this Court must examine: 1) whether civil aiding and abetting liability is broadly, if not universally, accepted by the international community and 2) whether the principle, as accepted by the international community, is defined with “specificity” in each regard to a degree comparable to the “18th-century paradigms.”

The common law imposition of civil aiding and abetting liability does not meet this test.

1. First, there is no such international norm for civil aiding and abetting liability. Plaintiffs do not contend otherwise, choosing instead to base their argument entirely on practice of certain international criminal tribunals. (No. 05-2326 at 35-39; No. 05-2141 at 34-40). But in *Sosa*, the Court stressed that the federal courts should exercise “great caution in adapting the law of nations to private rights,” 124 S.Ct. at 2764. It is highly relevant that the law of nations generally does not recognize a specific private right to redress for civil aiding and abetting liability.

While the concept of criminal aiding and abetting liability is well established, the statutes of the international criminal tribunals appellants rely upon do not provide for civil aiding [and] abetting liability. Indeed, one of the only contexts in which civil liability for aiding and abetting is addressed explicitly is in an annex to a U.N. Resolution, and that document only addresses aiding and abetting between states and provides a different standard from that put forward by the plaintiffs.<sup>13</sup>

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<sup>13</sup> See article 16 of the International Law Commission’s draft articles on “Responsibility of States for Internationally Wrongful Acts,” annexed to UN General Assembly Resolution 56/83, adopted January 28, 2002 (“A State which aids or assists another State in the commission of an internationally



Plaintiffs' bold request for judicial legislation cannot be squared with the Supreme Court's instructions. In *Sosa*, the Court recognized "that the general practice \* \* \* [is] to look for legislative guidance before exercising innovative authority over substantive law." 124 S.Ct. at 2762. For this and other reasons, the Court instructed that the courts use "great caution in adapting the law of nations to private rights." *Id.* at 2764. Here, plaintiffs are not simply asking the court to "adapt" a well-established and well-defined civil norm of aiding and abetting liability. Rather, they are asking this Court to create such a norm and provide all of the content for the norm as well. This is far beyond the cautious and limited exercise of common law authority permitted under *Sosa*.

2. Plaintiffs try to remedy this fatal shortcoming by appealing to international practice regarding criminal aiding and abetting. Not only does that practice not answer the questions that would confront American courts, but it is particularly unsuited as a springboard to domestic civil aiding and abetting liability. As discussed above, there is no "general presumption" that criminal aiding and abetting liability extends liability to the civil context. Rather, the general presumption under our domestic law is that such an extension requires an independent legislative policy choice. *Central Bank of Denver*, 511 U.S. at 182.

Moreover, the decision to charge a person for an international crime is a grave matter requiring careful exercise of prosecutorial judgment by government officials. That prosecutorial judgment serves as a substantial practical check on the application of the criminal aiding and abetting standard.<sup>14</sup> Opening the doors to civil aiding and abetting claims in U.S. courts through the ATS could not

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wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.") This formulation does not address the degree of assistance required. Moreover, the Commentary on this article indicates that the State must have intended to facilitate the wrongful conduct, a purpose element also missing from plaintiffs' proposed ATS standard. See J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, 149 (2002).

<sup>14</sup> Notably, one stated reason why the United States refused to join the Rome Statute of the International Criminal Court, which provides for crimi-

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be more different. Any aggrieved aliens, anywhere in the world, could potentially bring an ATS civil suit in the United States, claiming that a private party aided or abetted abuses committed abroad against them by their own government. Such a “vast expansion” of civil liability by adoption of an aiding and abetting rule, *Central Bank of Denver*, 511 U.S. at 183, is not contemplated in any competent source of international or federal law, criminal or civil.

\* \* \* \*

3. Even on its own merits, the international criminal norms plaintiffs seek to rely upon do not satisfy *Sosa*’s requirements for incorporation into federal common law under the ATS. International criminal aiding and abetting is not one of those “handful of heinous actions—each of which violates definable, universal and obligatory norms,” *Sosa* at 2766 (quoting Edwards, J., in *Tel-Oren*, *supra* at 781), nor is it all similar to the historical precedents that *Sosa* teaches should be the measure for supporting a new cause of action under the ATS. See E. Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111, 134, 158 (2004) (describing six characteristics of piracy that made it suitable for ATS coverage and absence of those characteristics in aiding and abetting claims).

Moreover, the standard the plaintiffs propose differs materially from the most recent formulations adopted in international practice. While the plaintiffs propose a “knowledge” standard, the Rome Statute to which 99 countries are party requires a defendant to act “for the purpose of facilitating the commission” of a crime (article 25(3)). The same standard was adopted by the United Nations Administration for East Timor. See 2000 UNATET Reg. No. 2000/15-14.3(1).

Plaintiffs draw their “knowledge” standard from the ad hoc International Criminal Tribunal for the Former Yugoslavia and the

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nal aiding and abetting liability, is that it lacks sufficient checks on prosecutorial discretion. See American Foreign Policy and the International Criminal Court, Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002 (<http://www.state.gov/p/9949pf.htm>). . . .

International Criminal Tribunal for Rwanda. While “the ICTY and ICTR Statutes were created by resolutions of the United Nations Security Council,” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F.Supp.2d at 338, the rulings of the ICTY and the ICTR are specific to their jurisdictions, and their discussions do not bind other international bodies. Accordingly, it would be inappropriate for a federal court, as a matter of federal common law, to adopt these criminal statutes and rulings as establishing a general civil aiding and abetting liability rule of “international character accepted by the civilized world.” *Sosa*, 124 S.Ct. at 2761.

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(3) *Doe v. Exxon Mobil Corp.*

On October 14, 2005, the U.S. District Court for the District of Columbia dismissed claims brought under the Alien Tort Statute and Torture Victim Protection Act for violations committed “in the course of protecting and securing defendants’ liquid natural gas extraction pipeline and liquification facility in Arun, Indonesia.” *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). As explained by the court, the plaintiffs alleged that

during an on-going conflict with the Indonesian government and Achenese rebels, defendants contracted with a unit of the Indonesian national army (“PT Arun”) to provide security for the pipeline. Defendants allegedly conditioned payment on providing security, made decisions about where to build bases, hired mercenaries to train the security troops, and provided logistical support. Plaintiffs claim that Exxon and PT Arun are liable for the alleged actions of the Indonesian soldiers, as an aider and abettor, a joint action/joint venturer, or as a proximate cause of the alleged misconduct.

The court dismissed claims brought under the ATS for failure to state a claim and those brought under the TVPA because that statute does not apply to corporations. As to state law claims, the court dismissed claims against Pertamina, a

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state-owned oil and gas company, but concluded that the remaining state law tort claims would be allowed to proceed “with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty. To this end, there will be firm control over any discovery conducted by plaintiffs.”

Excerpts follow from the court’s analysis of the ATS claims (footnotes omitted). For the discussion of TVPA claims in the case, *see* 5.b.(1) below.

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Plaintiffs allege a host of potential violations, including genocide, torture, crimes against humanity, arbitrary detention (kidnapping), extrajudicial killing (including murder), and sexual violence. *See* Compl. P 26. Defendants respond that adjudication of these claims impermissibly interferes with Indonesia’s sovereignty and U.S. foreign policy, and that plaintiffs fail to allege facts that would, if proved, fix liability on Exxon and PT Arun. In assessing whether plaintiffs have stated a claim under the Alien Tort Statute, courts must conduct a more searching merits-based inquiry than is required in a less sensitive arena. *See, e.g., Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1519 (D.D.C. 1984) (citation omitted), vacated on other grounds by 257 U.S. App. D.C. 85, 807 F.2d 1000 (D.C. Cir. 1986).

In this light, defendants cannot be held liable for violations of international law on a theory that they aided and abetted the Indonesian military in committing these acts, largely for the reasons explained by the court in *In re South Af. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004). . . .

Nor can plaintiffs maintain a claim for “sexual violence,” because it is not sufficiently recognized under international law and is not a “specific, universal, and obligatory” norm (although claims of sexual violence may be cognizable elements of such illegal conduct as torture).

Defendants here also contend that plaintiffs have failed to exhaust local remedies on the remaining allegations, thereby precluding their Alien Tort Statute claims. *Sosa* indicated that exhaustion

may be necessary “in an appropriate case,” but it did not directly rule on the issue. 124 S. Ct. at 2766 n.21. Even assuming plaintiffs must exhaust local remedies, however, it is apparent here that efforts to pursue this case in Indonesia would be futile. *See Hammontree v. NLRB*, 288 U.S. App. D.C. 266, 925 F.2d 1486, 1517 (D.C. Cir. 1991) (“exhaustion is a prudential doctrine that should be applied flexibly and not when further pursuit of remedies is futile.”) (citation omitted). Defendants submit an affidavit from Indonesian Supreme Court Justice Bismar Siregar stating that plaintiffs’ claims could be litigated in Indonesia. Plaintiffs effectively counter that they risk the very real possibility of reprisals, including death, if they pursue their claims there. A substantial and serious threat of violence easily meets the futility standard. *See Rasoulzadeh v. Assoc. Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff’d without op.* 767 F.2d 908 (2nd Cir. 1985).

1. Genocide and Crimes Against Humanity

Genocide has been defined as “acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group.” *Tel-Oren v. Libyan Arab Repub.*, 233 U.S. App. D.C. 384, 726 F.2d 774, 806 (D.C. Cir. 1984) (Bork, J., concurring) (citation omitted). Similarly, a systematic attack on certain segments of a population is a crime against humanity. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 479-80 (S.D.N.Y. 2005) (citations omitted). Genocide and crimes against humanity are generally actionable under the Alien Tort Statute as international law violations. However, by definition these claims require adjudication on whether the Indonesian military was engaged in a plan allegedly to eliminate segments of the population; assessing whether Exxon is liable for these international law violations would be an impermissible intrusion in Indonesia’s internal affairs. In *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), the court declined to adjudicate claims of genocide and crimes against humanity when those claims required the court to evaluate the policy or practice of the foreign state. *See id.* at 1307-11. That precedent will be followed here.

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### 2. Torture, Arbitrary Detention, and Extrajudicial Killing

In general, resolving claims of complicity in arbitrary detention, torture, and extrajudicial killing pose less of a threat of infringing Indonesia's sovereignty. These allegations are more targeted to actions by individuals, rather than a plan of mass killing or mayhem. They also conceivably violate the law of nations. *See Sosa*, 124 S. Ct. at 2768 (citing with approval the Restatement (Third) of Foreign Relations Law's conclusion that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention") (citation omitted); *id.* at 2763 (holding that the Torture Act contains "a clear mandate . . . providing authority that 'establishes an unambiguous and modern basis for' federal claims of torture and extrajudicial killing") (citation omitted); *see also Tel-Oren v. Libyan Arab Repub.*, 233 U.S. App. D.C. 384, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring). However, as explained below, plaintiffs fail to plead these violations adequately.

#### a. *Color of Law*

Traditionally only states (and not persons) could be liable under the Alien Tort Statute for torture, arbitrary detention, or extrajudicial killing. *See Sanchez-Espinoza v. Reagan*, 248 U.S. App. D.C. 146, 770 F.2d 202, 206-07 (D.C. Cir. 1985). Recently, however, a few courts have held individuals liable for Alien Tort Statute violations when they acted under color of law. These courts have borrowed heavily from 42 U.S.C. § 1983 color of law jurisprudence. *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2nd Cir. 2001). Reasoning in these cases is unpersuasive, however. Grafting § 1983 color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states. *See Sanchez-Espinoza*, 770 F.2d at 206-07. Recognizing acts under color of law would dramatically expand the extraterritorial reach of the statute. Just as aider and abetter liability for international law violations has been rejected by some courts as overly expansive and beyond Congress' mandate . . . , basing liability for Alien Tort Statute violations on color of law jurisprudence is a similar overreach.

The Supreme Court has recently admonished that "the determination whether a norm is sufficiently definite to support a cause of

action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.” *Sosa*, 124 S. Ct. at 2766. Similarly, here the State Department warns of untoward consequences of endangering United States’ relations with Indonesia.

Additionally, it is notoriously difficult to determine when a party has acted under color of law, making it harder for courts to engage in “vigilant doorkeeping.” See, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995). It is also highly unfair to corporations operating in states with potentially problematic human rights records which under the color of law rule may (or may not) be subject to liability for doing business there and benefitting from the state’s infrastructure. Indeed, the Supreme Court suggested that only states, and not corporations or individuals, may be liable for international law violations. See *Sosa*, 124 S. Ct. at 2766 n.20 (“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).

Apart from the doctrinal flaw in applying color of law analysis, plaintiffs fail to allege adequately either of the two bases upon which color of law arguably can be based—joint action, and proximate cause.

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(4) *Bancoult v. McNamara*

In 2004 the U.S. District Court for the District of Columbia dismissed claims against named U.S. current and former government officials and the United States related to the removal of persons indigenous to the Chagos Archipelago to make way for the establishment of a U.S. military facility in the Indian Ocean in the 1960s and 1970s. *Bancoult v. McNamara*, 370 F. Supp. 2d 1 (D.D.C. 2004). The court found that the claims against the United States brought under the ATS were barred because the suit raised nonjusticiable political questions. Plaintiffs appealed and on December 2, 2005, the United States filed a brief in the D.C. Circuit in support of



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affirmance. Excerpts below set forth the U.S. views that the claims were properly dismissed under the political question doctrine (footnotes omitted).

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As the district court correctly recognized, plaintiffs' lawsuit implicates nonjusticiable political questions under the principles of *Baker v. Carr*, 369 U.S. 186 (1962).

This Court recently held in *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), that a complaint challenging the Executive Branch's formulation and execution of foreign policy and military strategy, although cast in traditional tort-law terms, nevertheless implicated political questions over which federal courts could not constitutionally exercise jurisdiction. *See id.* at 198. The plaintiffs in *Schneider* sought damages on a variety of tort and international law theories for the United States's covert involvement in a military coup in Chile, and for its alleged complicity in the violence and deaths that resulted. In holding the complaint nonjusticiable, this Court explained that "recasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments," *id.* at 197, and emphasized that the plaintiffs could not avoid the political implications of their arguments by formulating their attack merely as one on the "implementation of [a] policy" rather than on the policy itself, *id.* at 198.

*Schneider* makes plain that the district court, which issued its opinion before *Schneider* was decided, properly declined to reach the merits of plaintiffs' claims. (fn. omitted) Though phrased, like the *Schneider* complaint, in traditional tort terms, plaintiffs' complaint in effect challenges the United States's negotiation and implementation of a formal international agreement with a strategic ally for the construction and operation of a secure military base in the Indian Ocean during the height of the Cold War. Such matters are "classically within the province of the political branches, not the courts." *Schneider*, 412 F.3d at 195. Indeed, the pages of plaintiffs' complaint are replete with attacks on judgments entrusted to the political branches. The Executive branch made a judgment that national security considerations required the United States to pursue



the [British Indian Ocean Territory] Agreement with Britain and build a military facility in the Indian Ocean notwithstanding the potential consequences for the local people; Congress, in turn, held hearings on the treatment of the Chagossians, but ultimately approved the base and voted to fund its construction. Plaintiffs cannot now superimpose a strata of tort law on these decisions. As this Court recognized in *Schneider*, the political question doctrine precludes Article III courts from asserting jurisdiction over controversies that, like the location and construction of the Diego Garcia base, “revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Schneider*, 412 F.3d at 195 (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

Indeed, the political questions implicated in this case are arguably even more salient than those in *Schneider*. Plaintiffs here seek to direct the remedial powers of the federal courts against the Executive Branch’s operation of a major military facility in an active war zone. The Diego Garcia base provides critical support services to American and British forces presently deployed in the Middle East, including in Iraq and Afghanistan. *See* Lucarelli Decl. ¶ 12. Plaintiffs seek renewed access to the Chagos Archipelago in the face of the political branches’ judgment that national security considerations preclude the Chagossians’ return to the islands.

Moreover, the United States by itself has no authority to grant plaintiffs the access they seek. Diego Garcia and the Chagos Archipelago remain under the exclusive sovereignty and control of the British government, *not* the United States. For plaintiffs to prevail, the federal courts would be required to question, if not explicitly countermand, the United States’s international agreements with the United Kingdom concerning civilians’ rights of access to a British territory. As *Schneider* makes clear, the Constitution forbids such an undertaking.

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(5) *Mujica v. Occidental Petroleum Corp.*

The U.S. District Court for the Central District Court of California issued two opinions in *Mujica v. Occidental Petroleum Corp.* on June 28, 2005: 381 F. Supp. 2d 1134 and 381 F. Supp. 2d 1164 (C.D. Cal. 2005). In the first of these opinions, the court denied motions to dismiss based on *forum non conveniens* and international comity, as discussed in Chapter 15.D.1.a.(2). In the second opinion, the court granted a motion to dismiss claims under the Alien Tort Statute as barred by the political question doctrine. It found state claims also barred for foreign affairs reasons.

The claims in *Mujica* allege violations of the ATS, the TVPA, and California state law arising from a bombing that occurred in Santo Domingo, Colombia, on December 13, 1998. Plaintiffs in the case lived in Santo Domingo and were personally injured or had relatives who were killed in the bombing raid. The defendants, Occidental Petroleum Corp. and Airscan, Inc., are both American companies. The basis of the claims, as alleged by plaintiffs and summarized by the court in both opinions, is excerpted below (citations to complaint omitted).

\* \* \* \*

. . . Defendant Occidental operates, as a joint venture with the Colombian government, an oil production facility and pipeline in the area of Santo Domingo.

Plaintiffs allege the following relevant facts. Since 1997, Defendant AirScan has provided security for Defendant Occidental's oil pipeline against attacks from left-wing insurgents. Prior to 1998, Defendants worked with the Colombian military, providing them with financial and other assistance, for the purpose of furthering Defendant Occidental's commercial interests. On several occasions during 1998, Defendant Occidental provided Defendant AirScan and the Colombian military with a room in its facilities to plan the Santo Domingo raid. Defendant AirScan and the Colombian Air Force ("CAF") carried out [the Santo Domingo] raid for the purpose of providing security for Defendant Occidental (i.e., protect-

ing its oil pipeline) and was not acting on behalf of the Colombian government. During the raid, three of Defendant AirScan's employees, along with a CAF liaison, piloted a plane with CAF markings that was paid for by Defendant Occidental. From this airplane, Defendant AirScan provided aerial surveillance for the CAF, helping the CAF identify targets and choose places to deploy troops.

. . . During the attack, the CAF helicopters knowingly fired on civilians attempting to escape and on those who were trying to carry the injured to a medical facility. Soon thereafter, other CAF troops entered the town, blocked civilians from leaving, and ransacked their homes.

While the purpose of the Santo Domingo raid was to protect Defendant Occidental's pipeline from attack by left-wing insurgents, no insurgents were killed in the attack. . . .

\* \* \* \*

On December 30, 2004, at the invitation of the court, the United States filed a Statement of Interest, attaching a letter from then Department of State Legal Adviser William H. Taft, IV, addressing foreign affairs issues. *See Digest 2004* at 376-80.

In its 2005 decision on this issue, 381 F. Supp. 2d 1164, the court held that the TVPA does not apply to corporations and dismissed claims brought under that statute. The court then dismissed all claims, finding that the action raised a non-justiciable political question, on the basis of lack of respect for coordinate branches of the government and adherence to a policy decision. Excerpts below provide the court's analysis in concluding that several factors for determining a political question, as set out in *Baker v. Carr*, 369 U.S. 186 (1962), are applicable to *Mujica* (most footnotes omitted).

\* \* \* \*

Defendant argues that this case presents a nonjusticiable political question because (1) it touches on a matter of foreign relations; and (2) it would involve military decisions which the court does not have the standards to evaluate. . . While these are reasonable grounds on which to argue that the political question doctrine

should apply, the Court will focus on the Supplemental Statement of Interest filed by the U.S. State Department.

In the recent *Alperin* opinion, the Ninth Circuit thoroughly discussed the political question doctrine. Because of its analytical depth, the Court closely follows this opinion. . . .

At the outset, the Court observes that *Alperin* warned against “jumping to the conclusion” that all cases that touch on foreign relations and potentially controversial political issues are barred by the political question doctrine. . . . As is often noted, this doctrine is one of “political questions” not “political cases” and should be applied on a case-by-case basis. . . . The Court recognizes that only one factor needs to apply to render this case nonjusticiable. . . .

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### 3. Lack of respect for coordinate branches

The fourth *Baker* factor requires the Court to consider whether it would be possible to resolve this case without expressing a lack of respect for the Executive’s handling of foreign relations. In *Alperin*, the Ninth Circuit held that its case did not run such a risk largely because the State Department did not attempt to intervene in the matter despite the urging of the Vatican. *Id.* The court noted that “[s]uch case-specific intervention is not uncommon in cases involving foreign affairs” and cited Judge Morrow’s opinion in *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) with approval. . . .

In *Sarei*, the court dismissed plaintiffs’ case on political question grounds. . . . In that case, the State Department filed a Statement of Interest indicating that allowing the plaintiffs to proceed with their case would interfere with the efforts of the Papua New Guinea and American governments to reach a peaceful end to the conflict giving rise to the suit. *Id.* 221 F. Supp. 2d at 1196. The court concluded that allowing the case to proceed, in the face of such a Statement of Interest, would implicate the fourth and sixth *Baker* factors. . . .

In the instant case, the State Department has filed a Statement of Interest outlining several areas of foreign policy that would be negatively impacted by proceeding with the instant case. In addition, as outlined in that letter, the State Department has expressed its view

that this litigation would interfere with its approach to encouraging the protection of human rights in Colombia. Notably, the State Department apparently agrees with Plaintiffs that a wrong has occurred: “On January 3, 2003, the U.S. Embassy in Bogota informed the Colombian government of the U.S. decision to suspend assistance to CACOM-1, the Colombian Air Force unit involved in the Santo Domingo incident.” *See* Supp. Statement of Interest at 1-2.

However, the fourth Baker factor applies to the instant case because proceeding with the litigation would indicate a “lack of respect” for the Executive’s preferred approach of handling the Santo Domingo bombing and relations with Colombia in general. In reaching this conclusion, the Court pays particular attention to the fact that this case involves foreign relations, an area over which the Executive has a great deal of responsibility. *See Garamendi*, 539 U.S. at 414 (“Although the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the executive power vested in Article II of the Constitution has recognized the President’s vast share of responsibility for the conduct of our foreign relations.”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952) (Frankfurter, J., concurring)). *Cf. Sosa*, 124 S. Ct. at 2766 n.21 (noting that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”). Were the Executive to file a statement of interest regarding an issue that did not involve foreign policy, it would deserve less weight.

For the above reasons, the Court finds that the fourth Baker factor supports applying the political question doctrine.<sup>25</sup>

The court also discussed the applicability of the Statement of Interest in dismissing the state law claims. After find-

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<sup>25</sup> For similar reasons, the fifth *Baker* factor, adherence to a policy decision, would also render the instant case non-justiciable. Unlike *Alperin*, the Executive has indicated that it wishes to pursue non-judicial methods of remedying the wrongs committed in Santo Domingo. Further adjudication of this case would constitute disagreement with this prior foreign policy decision. 410 F.3d 532, 2005 WL 1355589 at \*19.

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ing some of the state law claims time-barred, the court then considered whether the foreign affairs doctrine applied to the remaining claims for wrongful death, intentional infliction of emotional distress, and negligent infliction of emotional distress, as excerpted below.

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As a threshold matter, the Court believes that these [state law] claims involve an area of “traditional competence” for state regulation—tort law. In this respect, the instant state law claims are different than the HVIRA, a law targeted specifically at the issue of Holocaust-related insurance policies. *See Garamendi*, 539 U.S. at 426 (stating that there is “no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State”). Unlike the HVIRA, the California legislature could have hardly envisioned that these laws would have implicated any foreign policy concerns. Thus, the Court should “consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.” *Id.* 539 U.S. at 420.

With respect to Plaintiffs’ tort claims, the Court finds that California has a weak interest . . . because Plaintiffs have never resided in this state. . . With respect to Plaintiffs’ wrongful death claims, California also has a weak interest since the tortious conduct did not take place in California and Defendant is a resident of this state. . . Since California has a weak interest in Plaintiffs’ claims, there does not have to be a strong conflict to preempt their claims. *See Garamendi*, 539 U.S. at 420.

The Court finds that the “more than incidental” strength of the instant conflict with foreign policy is sufficient to overcome the weak state interest of Plaintiffs’ claims. As explained in the U.S. State Department’s Supplemental Statement of Interest, allowing

Plaintiffs to pursue these state law claims would interfere with several of its foreign policy goals.<sup>18</sup>

An important part of our foreign policy is to encourage other countries to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses. Duplicative proceedings in U.S. courts second-guessing the actions of the Colombian government and its military officials and the findings of Colombian courts, and which have at least the potential for reaching disparate conclusions, may be seen as unwarranted and intrusive to the Colombian government. Moreover, it may also be perceived that the U.S. Government does not recognize the legitimacy of Colombian judicial institutions. These perceptions could potentially have negative consequences for our bilateral relationship with the Colombian government. Colombia is one of the United States' closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking. . . . Colombia's role in helping to maintain Andean regional security, our trade relationship, and our national interest in the security of U.S. persons and U.S. investments in Colombia, rank high on our foreign policy agenda. . . .

Lawsuits such as the one before Judge Rea have the potential for deterring present and future U.S. investment in Colombia. . . . Finally, reduced U.S. investment in Colom-

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<sup>18</sup> The Court notes that it must take these statements regarding foreign policy at face value. *See Sarei*, 221 F. Supp. 2d at 1181-82 (holding that "the court must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning"); *cf. Sosa*, 124 S. Ct. at 2766 n.21 (noting that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *Republic of Austria v. Altmann*, 541 U.S. 677, 159 L. Ed. 2d 1, 124 S. Ct. 2240, 2255 (2004) (with respect to foreign sovereign immunity, stating that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled deference as the considered judgment of the Executive on a particular question of foreign policy") (emphases in original).

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bia's oil industry may detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil.

*See* Supplemental Statement of Interest of the United States, filed December 30, 2004 at 2.

Since these strong federal foreign policy interests outweigh the weak state interests involved, the Court dismisses Plaintiffs' state law claims pursuant to the foreign affairs doctrine.

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### ***b. Torture Victim Protection Act***

#### **(1) Doe v. Exxon Mobil Corp.**

As discussed in 5.a.(3) *supra*, on October 14, 2005, the U.S. District Court for the District of Columbia dismissed claims brought under the Torture Victim Protection Act, holding that the TVPA does not apply to corporations, *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). Excerpts follow from the court's opinion on that issue. The court in *Mujica v. Occidental Petroleum Corp.*, 5.a.(5), *supra*, reached the same conclusion.

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The Torture Act creates liability for "an individual" who subjects an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note § 2(a)(1)-(2). The parties disagree about the meaning of "individual." Plaintiffs argue that "individual" means a "person," which includes corporations. Defendants insist that the word "individual" has a precise meaning and is limited to human beings. On balance, the plain reading of the statute strongly suggests that it only covers human beings, and not corporations. *See Clinton v. New York*, 524 U.S. 417, 428-29, 141 L. Ed. 2d 393, 118 S. Ct. 2091 nn.13-14, (1988) (holding that term "individual" meant "person" in the specific context of the line-item veto legislation, but noting that "Congress did not intend the result that the word



‘individual’ would dictate in other contexts,” when “person” ordinarily had a broader meaning than “individual”).

Even if “individual” could be construed to mean “corporation,” plaintiffs face a larger problem. By the clear language of the Torture Act, a party must act “under actual or apparent authority, or color of law” to be liable under the statute. 28 U.S.C. § 1350 note § 2(a)(1)-(2). . . . [D]efendants did not act under color of law. In addition, determining whether they acted under color of law impermissibly requires adjudication of another country’s actions. *See Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (legislative history of Torture Act confirms that plaintiff must establish government involvement in killing or torture to state a claim).

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(2) *Enahoro v. Abubakar*

In *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), the Seventh Circuit held that a claim based on allegations of torture and extrajudicial killing must be brought under the Torture Victim Protection Act, which creates a cause of action and imposes procedural requirements, rather than as a common law claim under the Alien Tort Statute. Because plaintiffs had based jurisdiction on the ATS, the court remanded “for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state such a claim and, if they do, whether, in fact, the exhaustion requirement in the Torture Victim Protection Act defeats their claim.” Excerpts on this issue follow (footnotes omitted).

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The plaintiffs before us allege significantly more appalling violations than did Alvarez [in *Sosa*]. Their allegations fall into two primary categories that the *Sosa* Court specifically recognized as violations of the law of nations: torture and killing. The Court also noted that Congress has provided an “unambiguous” basis for “federal claims of torture and extrajudicial killing” in the Torture Victim Protection Act of 1991, 106 Stat. 73. *Sosa*, 124 S. Ct. at 2763.

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This would seem to be positive news for the plaintiffs. But that may not necessarily be so. In the district court, Abubakar argued that because the plaintiffs had not complied with the exhaustion requirement in the Torture Victim Protection Act, their case should be dismissed. The district judge rejected the argument because the plaintiffs had not pled their case under the Act and therefore had no need to comply with its requirements. The implication of the district court's decision is that there are two bases for relief against torture and extrajudicial killing: the statute and independently existing common law of nations condemning torture and killing. The issue, then, becomes whether both can simultaneously exist to provide content to the ATS. In other words, does the Torture Victim Protection Act occupy the field or could a plaintiff plead under the Act and/or under the common law?

We find that the Act does, in fact, occupy the field. If it did not, it would be meaningless. No one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law. While there is no explicit statement to this effect in *Sosa*, the implications are that the cause of action Congress provided in the Torture Victim Protection Act is the one which plaintiffs alleging torture or extrajudicial killing must plead. As we said, the Court found that Act an "unambiguous" basis for such claims. The Court went on to say that the affirmative authority is confined to its specific subject matter, and that the legislative history says that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," but the Court said Congress had done nothing to promote other such suits. *Id.* The Court emphasizes that "great caution" must be taken to adapt the laws of nations to private rights. It requires "vigilant door-keeping." The Court was concerned with "collateral consequences" of making international rules privately actionable: The subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make court particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. . . . Since many attempts

by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. *Id.* It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed. As relevant to this case, then, the ATS would provide jurisdiction over a suit against General Abubakar for violations of the Torture Victim Protection Act.

But, as we mentioned, one procedural requirement in the Act is exhaustion. Section 2(b) says:

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

\* \* \* \*

## **I. RULE OF LAW AND DEMOCRACY PROMOTION**

### **1. Statements by Secretary of State Condoleezza Rice**

On April 1, 2005, Secretary Rice addressed the annual meeting of the American Society of International Law in Washington, D.C. on the importance of the rule of law in democracies. The full text of her remarks, excerpted below, is available at [www.state.gov/secretary/rm/2005/44159.htm](http://www.state.gov/secretary/rm/2005/44159.htm).

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I've said that the time for diplomacy is now. One of the pillars of that diplomacy is our strong belief that international law is vital and a powerful force in the search for freedom. The United States has been and will continue to be the world's strongest voice for the development and defense of international legal norms. We know from history that nations governed by the rule of law are nations that are just. We know that they share the blessings of liberty and

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opportunity and security with their people. In stark contrast, we know that nations that are lawless or where laws serve might, not right, tend to be places cursed by chaos and corruption and conflict and poor living conditions for their people.

From our democracy's earliest days, Americans have embraced the concept of liberty in law. Today, people on every continent are embracing that same fundamental concept, and as more and more states establish the rule of law we are witnessing important strides for personal freedoms, for political freedoms, for free enterprise and for freedom from fear. America has historically been the key player in negotiating treaties and setting up international mechanisms for the peaceful resolution of disputes, and a major thrust of our diplomatic efforts today is to work with governments and representatives of civil society all around the world to expand the rule of law both in domestic affairs of states and in their relations with each other. This is a time of unprecedented opportunity for America to work in partnership with other democracies around the world to advance the cause of liberty and justice for all. And as Secretary of State, I, and if the Senate so consents, John Bellinger, who is the Legal Advisor-designate, look forward to continuing America's tradition of leadership in the worldwide promotion of the rule of law.

America is a country of laws. When we observe our treaty and other international commitments, . . . other countries are more willing too to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

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On November 9, 2005, Secretary Rice addressed the American Bar Association's Rule of Law Symposium in Washington, D.C., on commitment to the rule of law. The secretary's remarks, excerpted below, are available at [www.state.gov/secretary/rm/2005/56708.htm](http://www.state.gov/secretary/rm/2005/56708.htm).

\* \* \* \*

President Bush and I share your commitment to the rule of law. And let me just say that I personally have always viewed issues of law as fundamental because I remember in my own life in my own time that as a black girl growing up in the segregated South, the rule of law did not always serve me. And so I think I have a particular appreciation for how important it is that the state respect the rule of law.

... The advance of freedom and the success of democracy and the flourishing of human potential all depend on governments that honor and enforce the rule of law. Today, America's belief in the universal nature of human liberty, a belief we expressed in our Declaration and enshrined in our Constitution, now leads us into a world to help others win their freedom and secure it in law.

Today, the greatest challenges that we face emerge more from within states than between them—from states that are either unable or unwilling to apply the rule of law within their borders. In a world where threats pass even through the most fortified boundaries, weak and poorly governed states enable disease to spread undetected and corruption to multiply unchecked and hateful ideologies to grow more violent and more vengeful.

As the fate of nations grows ever more connected, our challenges are unprecedented, but our purposes are clear: Where weaker governments possess the will but lack [the] means to enforce the rule of law, we must empower them with the strength of our partnership. And where autocrats still rule by coercion of the state rather than by the consent of the governed, we must support the rights of their oppressed citizens, wherever they raise their voice for equal justice and lawful government.

Where the rule of law is undermined by government corruption, we are offering incentives for honest and transparent behavior. Anti-corruption is one of the key standards of our Millennium Challenge Account initiative, an initiative that rewards good governance and the fight against corruption. And in just the past year, the Millennium Challenge Corporation has signed new development compacts with five countries that are worth hundreds of billions of dollars to those countries, each of which involves significant political and legal reforms.

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Where the rule of law is flouted by immoral rulers and war criminals, we are helping citizens to operate international tribunals and special courts of justice. The United States helped to launch such efforts in Rwanda and Sierra Leone and the former Yugoslavia. And we continue to support all people who seek justice for their nations by lawfully trying the criminals who ravaged them.

Finally, where the rule of law is emerging from decades of tyranny, the United States is helping newly democratic peoples to liberate themselves.

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. . . [W]e empower our partners in weak and poorly governed states to uphold the rule of law, we also expect them to meet their international obligations. For the United States, an essential element of the rule of law has always been, and still remains, law among nations. We've always respected our international legal obligations and we have led the world in developing new international law.

Indeed, this has made America somewhat unique in the world and in world history because we try and use our great power not to win glory or imperial gain for ourselves but to establish international rules and norms that we encourage others to follow. After World War II, we negotiated new treaties and built new international institutions for the peaceful resolution of disputes. And today, one of my highest priorities is to transform our great institutions, like the United Nations, to reflect the world as it is in 2005, not as it was in 1945.

. . . We Americans have never viewed liberty and law as detracting from one another. Indeed, our Founding Fathers believed, as John Locke did, that the purpose of law is not "to abolish or restrain [freedom], but to preserve and enlarge freedom." And from the earliest days of our Republic, America has proclaimed the principle that without law, liberty becomes licentiousness and without liberty, law becomes oppression.

America strives to realize our calling as a nation of laws, not of men, a nation that holds all governments and citizens, especially our own, to principles that transcend mere brute force or will to power. When Americans violate the law, whether in our country or

in foreign lands, we do and we should hold them accountable for their crimes as we saw in the aftermath—after the horrific events that sickened us all at Abu Ghraib.

The virtue of the rule of law is not that it erases all human imperfection but that it upholds a standard of justice that enables democratic societies to improve themselves over time.

America is a country of laws. We will always be a country of laws. And we will remain an international leader because we will be committed, not simply to our strength but to our love of liberty, our support for democracy and most of all, our devotion to the rule of law. . . .

## 2. UNCHR High-Level Statement

In remarks to the High-Level Segment of the 61st Session of the UN Commission on Human Rights on March 17, 2005, Paula Dobriansky, Under Secretary of State for Global Affairs, stressed the role of democracy in human rights, as excerpted below. The full text of Ms. Dobriansky's remarks is available at [www.humanrights-usa.net/2005/0317Dobriansky.htm](http://www.humanrights-usa.net/2005/0317Dobriansky.htm). See also Statement by Ambassador Juan Martabit, Permanent Representative of Chile on behalf of Community of Democracies' Convening Group, including the United States, on March 18, 2005, available at <http://geneva.usmission.gov/humanrights/2005/ChileCOD.pdf>.

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. . . There is an unmistakable link among human rights and democracy and peace. Therein lies our hope for the world—our support for the quest for liberty that is shared by people everywhere, and that forms the bedrock principles on which the United Nations and the Commission originally were founded.

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We seek to support this not only by expressing our solidarity, but also through a variety of direct means. We welcome the strong expressions of support for President Bush's call for a UN Democracy Fund. This initiative focuses on promoting and consolidating

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newly established democracies. The U.S. is also one of many supporters of the Community of Democracies—an association of nations committed to the promotion of democratic principles. . . .

We see this as an important vehicle to strengthen both the quality of resolutions and the composition of the Commission, as well as to make the Commission's outcomes consistent with the principles of the UN Charter. . . .

The United States will also work with other nations to advance a resolution at this Commission on standards for sound democratic elections. We also will seek to advance a resolution on freedom of association and rights of labor to organize, a basic element of an economically open, free, pluralistic, and democratic society.

Democracies should offer leadership in refocusing the Commission on its core mission, as it was originally conceived. Governments that are elected and that recognize their citizens' rights at home are in the best position to protect these fundamental rights globally. . . . If we do not reclaim this Commission for its mandate, we are allowing this body to be tarnished and turning our backs on those still fighting for the freedoms we possess.

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### 3. Statement to the UN General Assembly Third Committee

On October 31, 2005, Ambassador Sichan Siv, U.S. Alternate Representative to the General Assembly, addressed the Third Committee on Agenda Items 71(b), (c) and (e). Ambassador Siv's comments on the issue of corruption and democracy are excerpted below. The resolution mentioned in the text was introduced by the United States and a number of other countries on November 2 and withdrawn on November 17, 2005. The full text of Ambassador Siv's remarks is available at [www.un.int/usa//05\\_194.htm](http://www.un.int/usa//05_194.htm). See also statement by Ambassador Siv introducing in the Third Committee a resolution on "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization," at [www.un.int/usa/05\\_222.htm](http://www.un.int/usa/05_222.htm).



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As Secretary of State Rice said to the Community of Democracies, “we must usher in an era of democracy that thinks of tyranny as we think of slavery today: a moral abomination that could not withstand the natural desire of every human being for a life of liberty and dignity.” . . . We have come here with ideas and initiatives in-hand to help implement our collective pledges in the Outcome Document. It is “to support democracy by strengthening countries’ capacities to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States.”

Towards this end, the United States will introduce a resolution on “The Incompatibility Between Corruption and the Full Enjoyment of Human Rights.”

Corruption is a tremendous challenge to democracy. Its impact on the enjoyment of human rights is profound.

Corruption in elections and among politicians reduces accountability and representation in the political system.

Corruption in the judiciary undermines the principles of the rule of law and the rights and safety of the individual citizen.

Corruption in the public sector creates unequal access to public benefits.

The role and capacity of public administration is undermined because procedures are disregarded, resources are diverted, and appointments are skewed. As a result, confidence in politicians and public authorities and their reputation and legitimacy is impaired in the minds of their own population and internationally.

Furthermore, corruption hits the poorest and weakest the hardest of all. The poorest cannot afford to pay bribes or offer other forms of remuneration in order to safeguard their rights. This can mean that they do not get into schools or receive fair treatment in the judicial system and that they are excluded from political influence. The poorest are also hardest hit by the impact corruption has on the economy, employment, crime and the environment. Social disparities are cemented and marginalization of the poor is reinforced. Democracy and respect for human rights are essential in the fight against corruption; its elimination helps people enjoy human rights and strengthen democratic governance. Independent media

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and an active civil society are vital if the fight is to be effective. Corruption is more easily detected in a transparent society and transparency can have a preventive effect.

Elections are the first step to ensuring the democratic process and accountability of a government to its citizenry. The United States will also introduce a biennial resolution on elections to commend the work of the UN in monitoring and encourage Member States to continue contributing to this vital effort.

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#### 4. Statement to the UNCHR

On March 31, 2005, Mark P. Lagon, Deputy Assistant Secretary of State for International Organization Affairs, addressed the UNCHR concerning two resolutions, stating: "To advance civil and political rights as the very heart of the Commission's work, the United States is tabling or co-tabling resolutions before this body on 'Promoting the Rights to Freedom of Peaceful Assembly and of Association' and on 'Democracy and the Rule of Law.'" Mr. Lagon's remarks, excerpted below, are available at [www.humanrights-usa.net/2005/0331Item11.htm](http://www.humanrights-usa.net/2005/0331Item11.htm).

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A free society respects the rights of individuals to assemble peacefully and to associate freely—for political advocacy, a free and independent press, literary expression, trade union activities, religious belief and practice, and for individuals who may espouse minority or dissident religious or political beliefs.

A free society supports legal protection for individuals exercising the rights to freedom of peaceful assembly and of association. Only in such a system, can people fully flourish as free human beings, exercising their rights. Both freedom of peaceful assembly and freedom of association foster the growth of democracy.

Second, more broadly, democracy is the best guarantor of the inalienable human rights the Commission exists to protect and extend.

This is why last year at the Commission, the U.S. co-tabled with Romania, Peru, and Timor Leste a resolution empowering the High Commissioner to coordinate U.N. programs to promote rule of law and democracy on the ground in transitioning nations. The United States gave a sizable contribution last year to fund the Office's "focal point" on democracy established by this resolution.

Credible elections meeting international standards are a crucial element of democracy. But democracy encompasses so much more than elections.

The independence of the judiciary and the accountability of members of the legislature and the executive are essential to a vibrant democracy.

People in the society must be aware of the opportunity to resort to the legal system when their rights are infringed or deprived. The principles of equal protection under the law and before the courts must be respected within the legal system of each country. Democracy affords access to the judicial system by members of disadvantaged groups, and due process of law.

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## **5. Specific Comments on Belarus**

During 2005 the United States commented on concerns with specific rule of law issues in individual countries. In one such case, on December 2, 2005, Department of State Spokesman Sean McCormack issued a statement expressing U.S. concern with proposed amendments to the criminal code of Belarus. The statement is set forth below in full and available at [www.state.gov/r/pa/prs/ps/2005/57598.htm](http://www.state.gov/r/pa/prs/ps/2005/57598.htm). The Belarus parliament passed the legislation on December 8, 2005. See further statement from the Office of the Spokesman on that date, describing the legislation as "punishing 'damaging' contacts with foreign states and organizations or 'discrediting Belarus' in [the] eyes of foreign governments and international organizations," available at [www.state.gov/r/pa/prs/ps/2005/57837.htm](http://www.state.gov/r/pa/prs/ps/2005/57837.htm).

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The United States joins the European Union in once again expressing concern about developments in Belarus. The Belarusian National Assembly gave preliminary approval to a bill amending the penal code. The provisions of the bill appear to violate international norms and many of Belarus' human rights commitments, including the rights to freedom of association and freedom of expression. This bill seems clearly aimed at intimidating Belarusian citizens and stifling free speech as the country approaches presidential elections in 2006.

The United States urges the Belarusian National Assembly to reconsider its decision and to reject the draft legislation in keeping with of Belarus' OSCE commitments. The United States also calls on the Belarusian authorities to take concrete steps to demonstrate their willingness to respect democratic values and the rule of law, so that the rights of Belarusian citizens are fully respected.

Adopting such undemocratic legislation could incur serious consequences for Belarusian authorities. The United States remains ready to take further restrictive measures against the responsible Belarusian authorities in the event of failure to uphold international standards. Together with the EU, we urge Belarusian authorities to reject this draft bill.

### J. TERRORISM

On April 21, 2005, Evelyn Aswad of the Office of Human Rights and Refugees in the Office of the Legal Adviser delivered the U.S. statement on the resolution it co-sponsored, entitled "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism," adopted as Resolution 2005/80. The full text of Ms. Aswad's remarks, excerpted below, is available at [www.humanrights-usa.net/2005/0421counterterrorism.htm](http://www.humanrights-usa.net/2005/0421counterterrorism.htm). The text of the resolution and related material are available in the UNCHR Report on the Sixty-First Session, E/CN.4/2005/135, [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

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. . . The United States is particularly pleased that this text, while creating a special mechanism that will aid the effort of protecting human rights while countering terrorism, requests the High Commissioner for Human Rights to assist the Commission's various special procedures to enhance coordination and avoid duplicative efforts. The United States understands that the intent of the resolution is to protect against the problem of overlapping mandates and duplicative efforts by the special procedures. The United States strongly agrees with this.

While countering terrorism, the United States remains committed to the promotion and protection of human rights and fundamental freedoms. The United States believes that we all must fight radicalism and terror with justice and dignity, to achieve a true peace, founded on human freedom. We recognize that the protection of human rights while countering terrorism is not merely a slogan or a truism, but is something that we, like all countries, must at the most fundamental level take into account and act upon, even when confronting people and organizations that are dedicated to killing our citizens and destroying our societies.

The United States again calls upon all States and organizations to look at what they have done to contribute to the fight against terrorism and see where they can do more. We call on states to join relevant international terrorism instruments, to enhance their counter-terrorism infrastructure, to work in a spirit of cooperation and openness with the UN Counterterrorism Committee and its Directorate, and with the Resolution 1267 Committee, and to seek, as needed, assistance from the U.N. Terrorism Prevention Branch. Only by the collaborative efforts of all States and of all the other international bodies will this global fight against terrorism be won.

On July 15, 2005, Robert Harris, Assistant Legal Adviser for Human Rights and Refugees, addressed the Supplemental Human Dimension Meeting of the OSCE, in Vienna, in closing remarks on human rights and the fight against terrorism. The full text of Mr. Harris' remarks, excerpted below, is available at [http://osce.usmission.gov/archive/2005/07/SDHM\\_Closing\\_Session\\_07\\_15\\_05.pdf](http://osce.usmission.gov/archive/2005/07/SDHM_Closing_Session_07_15_05.pdf).

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While countering terrorism, the United States remains committed to the promotion and protection of human rights and fundamental freedoms. The United States believes that we all must fight radicalism and terror with justice and dignity, to achieve a true peace, founded on human freedom. We recognize that the protection of human rights while countering terrorism is not merely a slogan or a truism, but is something that we, like all countries, must at the most fundamental level take into account and act upon, even when confronting people and organizations that are dedicated to killing our citizens and destroying our societies.

In this context, the United States is grateful to [the Election Observation Mission of the Office for Democratic Institutions and Human Rights (“ODIHR”)] and to the Slovenian Chairmanship for convening this meeting. The topic of human rights and the fight against terrorism is not only timely, but of a crucial importance to all 55 participating States. The United States was one of the countries that recommended and supported this topic last year.

In particular, we believe that this event has provided an important and useful opportunity to discuss ways to protect religious freedom during the fight against terrorism, useful observations on the subject of preventing torture and abuse, and methods of outreach to racial, religious and ethnic groups and civil society organizations, both so that these groups have an opportunity to shape and understand government policy, and also as a means of preventing discrimination and terrorism.

The United States thanks all governmental and non-governmental representatives who participated in the discussions at this meeting for sharing their views and experiences. We also thank participants for requesting—and listening to—the United States’ responses to some criticisms that were leveled here.

We welcome the opportunity to clarify U.S. policies in the area of human rights and the fight against terrorism. That is why we proactively explained our policies in a side event at the 2004 Human Dimension Implementation Meeting and why we explained them again here today, both in the working sessions and during our session on outreach and prevention of discrimination.

We have noted the brief responses given here by some national participants to criticism of their governments' policies, and we encourage these and other OSCE participating States to consider giving clear and thorough statements at this September's HDIM to explain what they are doing to implement their OSCE commitments in the fields of religious freedom, preventing torture, and creating space for civil society.

. . . I would like to thank the rapporteurs for their highly impressive efforts to synthesize what were wide-ranging discussions. We will review carefully their syntheses, noting that—of course—the session did not and could not negotiate formal recommendations on behalf of governments.

We do have several recommendations that we would like submitted for the record and I will submit them in a formal statement. . . .

U.S. Recommendations to the SHDM on Human Rights and the Fight Against Terrorism

1. All OSCE participating States should adhere to their obligations under international law, including in the fields of religious freedom and non-discrimination, preventing torture, and respecting freedom of association and creating space for the activities of an independent civil society.
2. All perpetrators of violent criminal acts should be prosecuted and held accountable. Terrorists who have committed (or conspired to commit) violent acts should be held accountable. Officials who have committed torture or other criminal abuse should also be held accountable.
3. Participating States should not improperly invoke national security as justification for limiting human rights and fundamental freedoms, including freedom of religion or belief. Here I refer you to our list of recommendations in Session 1.
4. Participating States should adopt policies of proactively reaching out to racial, religious and ethnic minorities and civil society organizations and to work with them to combat terrorism and to prevent discrimination.
5. Participating States should train law enforcement officers and other officials to respect cultural and religious diversity,

both as a means of preventing discrimination and racial/religious profiling, and as a means of preventing torture and cruel, inhuman or degrading treatment of detainees.

6. When abuses occur, participating States should act quickly to determine what went wrong, to bring perpetrators to justice, and to develop steps to prevent abuses in the future.

7. Finally, ODIHR should continue its fine work of assisting participating States to implement their commitments, through programs in the areas of legislative and judicial reform, training of magistrates, and monitoring trials and places of detention.

### Cross References

*Asylum and refugee issues*, Chapter 1.C.1.b. and D.

*Other cases brought under Alien Tort Statute*, Chapters 2.A.2. and 8.B.1.b. and 3.

*Allegations of torture in extradition cases*, Chapter 3.A.2.a. and b.  
*Transnational Organized Crime, Trafficking in Persons, and Smuggling of Migrants*, Chapter 3.B.4.

*UNCHR resolution on hostage-taking*, Chapter 3.B.8.

*Rule of law and treaty practice*, Chapter 4.B.1.

*Puerto Rican voting rights*, Chapter 5.B.1.

*Reform of the UN Commission on Human Rights*, Chapter 7.A.1.

*Claims by victims of Nazi era*, Chapter 8.B. 1 and 2.

*Freedom of expression and the internet*, Chapter 11.F.1.

*Cultural diversity*, Chapter 14.C.

*Declaration on Bioethics and Human Rights*, Chapter 14.D.2.

*Cuba embargo and human rights*, Chapter 16.5.

*Sanctions against Burma*, Chapter 16.6.

*Human rights issues in resolving status of Kosovo*, Chapter 17.A.5.

*Code of conduct for UN peacekeepers*, Chapter 17.B.3.b.

*U.S. detainee issues*, Chapter 18.A.3.

*Protocol Additional to the 1949 Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem*, Chapter 18.A.6.



## CHAPTER 7

### International Organizations

#### A. UNITED NATIONS

##### 1. UN Reform

###### *a. High-Level Report: A More Secure World*

In December 2004 the UN Secretary-General's High-Level Panel on Threats, Challenges and Change released its report, "A More Secure World: Our Shared Responsibility," which included, among other things, recommendations for UN reform. U.N. Doc. A/59/565 (2005), available at <http://documents.un.org>. Ambassador Patrick Kennedy, U.S. Representative for United Nations Management and Reform, provided the views of the United States on the report and issues of UN reform in an informal meeting of the UN General Assembly on January 31, 2005. The full text of Ambassador Kennedy's remarks, excerpted below, is available at [www.un.int/usa/05\\_013.htm](http://www.un.int/usa/05_013.htm).

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Let me underscore that the United States remains committed to efforts to build a more effective UN. We are open to looking at all options for UN reform, and will consider many of those of the High-Level Panel. The United States will evaluate any UN reform proposals in terms of whether they would achieve the objective of a more effective, efficient UN able to meet new challenges, consistent with the UN Charter. Deliberations on UN reform should not be

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limited to the recommendations of the panel's report. These recommendations should be but a first step in a more sweeping introspection and broader reform effort that UN Member States should undertake. Ultimately, broad consensus among Member States—both within the organization as a whole and in regional groups—will be essential to implementing any reforms.

President Bush, in his remarks in Halifax on December 1, called on other nations to work with us to make multilateral institutions and actions more effective in meeting the unique threats of our time. During his address to the General Debate of the 59th General Assembly on September 21, President Bush emphasized that “the American people respect the idealism that gives life to this organization.” He added, “Defending our ideals is vital—but it is not enough. Our broader mission as UN members is to apply these ideals to the great issues of our time. Our wider goal is to promote hope and progress as the alternatives to hatred and violence.” The High-Level Panel Report is in the spirit of that noble perspective and gives us a number of proposals, ideas and suggestions that will help us reach agreement on how to reform this body.

I would like to take a moment to address briefly a number of the issues raised by the Panel's extensive report:

- The United States strongly agrees with the Panel's emphasis on the need for a more effective international response to threats posed by terrorism, proliferation of weapons of mass destruction and their means of delivery, and failed states.
- We support the Panel's endorsement of the Proliferation Security Initiative (PSI) and call for compliance with all Security Council resolutions on terrorism and non-proliferation of weapons of mass destruction. We agree that a definition of terrorism needs to exclude state military operations and underscore that the fact of occupation does not justify the targeting and killing of civilians. Further, we commend the Panel's recognition that norms governing use of force by non-State actors have not kept pace with those pertaining to States, and its recommendation that the UN must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. We strongly commend the Report's recommendation

that states should join all twelve international terrorism conventions and protocols and adopt the Financial Action Task Force (FATF) eight Special Recommendations. We strongly support the Report's call for the Secretary General to promote a strategy to combat terrorism that includes efforts to counter extremism and intolerance.

- The Panel's recommendations for improving UN capabilities on peacekeeping and post conflict peace-building are of interest and should be given careful consideration.
- We strongly support the Report's call for a collective commitment to sustainable growth and poverty eradication.
- We would also like to see a universal commitment in the UN to promoting democracy and market-based economic systems. The Panel also cites a very important principle that comes out of the Monterrey Consensus, namely, each country has primary responsibility for its own economic and social development. The international community can help, but there is no substitute for domestic policies and institutions that promote growth. If the UN system is to be effective, it must help countries implement good governance and market-based policies that encourage entrepreneurship and business formation.
- The Panel's emphasis on confronting the security implications of HIV/AIDS and strengthening international cooperation to contain outbreaks of infectious diseases is particularly important and timely.
- The Panel is going in the right direction with its ideas for Secretariat reform.

In putting together its recommendations on a Peacebuilding Committee and a Peacebuilding Support Office, the High-Level Panel is rightly focused on the need for better coordination within the UN system and the donor community to plan and manage more effective post-conflict assistance.

We welcome the Panel's focus on human rights. In fact, human rights are reflected throughout the Panel's Report and its recommendations make clear that support for human rights is critical to peace-making as well as peace-building. As a body working to pro-

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tect and promote human rights around the world, the UN Commission for Human Rights faces a variety of challenges if it is to better meet its mandate. The rigidity of regional groupings, bloc voting on resolutions and the presence of egregious human rights violators on the Commission are, among other things, undercutting the Commission's ability to promote and protect human rights. The attack on country-specific resolutions, the Commission's primary tool in calling attention to specific human rights situations, is troubling.

The United States believes that universalization of the Commission, as recommended by the High-Level Panel, may not be the best way to enhance the effectiveness of the Commission for Human Rights in carrying out its mandate. Instead, the United States believes we need to look at a mix of structural and procedural reforms aimed at improving the Commission's membership and its ability to implement its vital mandate more effectively. We look forward to further engagement with Member States to ensure that the Commission for Human Rights lives up to its mandate.

We also applaud the Panel's acknowledgement that the Security Council needs to be more proactive in dealing with increased threats such as terrorism and the proliferation of weapons of mass destruction and must address their means of delivery, and act decisively and earlier.

With regard to the use of force, we will be discussing this matter further, but think that it is important to highlight several aspects today. We agree with the Panel's reaffirmation that Article 51 includes the right of anticipatory self-defense, and that Article 51 should not be re-written. Anticipatory action is an element of the inherent right of self-defense that pre-dates and remains lawful under the UN Charter. We would emphasize that the right of self-defense must today be understood and applied in the context of new threats posed by global terrorism and proliferation of weapons of mass destruction and their means of delivery. In recognition of the inherent and fundamental nature of self-defense, the United States opposes any reinterpretation of the UN Charter that would require Security Council approval as a precondition to a state using force in self-defense.

I would like to reiterate the United States' position on Security Council reform. The United States remains open to considering rec-

ommendations, including those of the High-Level Panel, concerning UN Security Council reform. We will evaluate all proposals to reform the Security Council in terms of their effectiveness. We believe that broad consensus—both within the organization as a whole and in regional groups—will be needed to advance any structural reform of the Security Council. In suggesting two models for an expanded Council, the Panel clearly recognizes the significant challenges that the international community must address in considering any Council expansion.

The United States has long advocated budget reform and wise financial stewardship as well as greater transparency in order to strengthen the UN. We are closely examining the Report's recommendations on strengthening financial accountability and efficient use of resources in the UN system. We will support initiatives that will ensure greater accountability from the UN, lead to increased transparency, and vastly improve the stewardship of the financial resources contributed by its Member States. I wish to make clear from the outset that implementation of reforms should advance through reprioritizing of resources and people so that the total UN budget and personnel levels do not increase as a result of our efforts.

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***b. UN Secretary-General Report: In Larger Freedom***

On March 21, 2005, UN Secretary-General Kofi Annan released his report, "In larger freedom: towards development, security and human rights for all." U.N. Doc. A/59/2005, available at <http://documents.un.org>. Secretary-General Annan explained:

... In September, world leaders will come together in New York to review progress made since the United Nations Millennium Declaration, adopted by all Member States in 2000 [U.N. Doc. A/RES/55/2]. In preparation for that summit, Member States have asked me to report comprehensively on the implementation of the Millennium Declaration. I respectfully submit that report today. I annex to it a proposed agenda to be taken up, and acted upon, at the summit.

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On April 7, 2005, Ambassador Shirin Tahir-Kheli, Senior Advisor to the Secretary of State on UN Reform, addressed the General Assembly on the Secretary-General's March report. The full text of Ambassador Tahir-Kheli's remarks, excerpted below, is available at [www.un.int/usa/05\\_063.htm](http://www.un.int/usa/05_063.htm).

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We welcome the Secretary General's positive emphasis on the importance of promoting freedom and respect for human rights and human dignity, advancing democracy, and strengthening the rule of law. We appreciate his support for the creation of a UN Democracy Fund, as proposed by President Bush last year. When created, a Democracy Fund will be instrumental, as the President said, "in laying the foundation of democracy by instituting the rule of law and independent courts, a free press, political parties and trade unions."

We also welcome the Report's call for the creation of a Peacebuilding Commission to improve the UN's post-conflict peacebuilding capabilities, a proposal that merits serious and careful consideration. There appears to be broad support for establishment of such a commission, and we want to work with like-minded countries to ensure that it can fulfill its important mission. The Peacebuilding Commission can become a centerpiece of the UN to help strengthen post-conflict states, and as such could become a key component of peace and security in the 21<sup>st</sup> century; it should be answerable to the Security Council. We recognize that its structure and organization must reach beyond the Security Council. It is vital that such a commission include in its membership both those with the most at stake and those with the most to contribute. We are indeed prepared to discuss these issues.

We support the Secretary General's recommendation to replace the Commission on Human Rights with a smaller, more effective Human Rights Council, and that this Council report directly to the General Assembly. Because we agree about the need to improve the capacity of her office to promote the rule of law on the ground in countries, we look forward to the plan of action from the High Commissioner for Human Rights. It will assist all Member States in assessing how best to ensure that critical human rights work not be

hamstrung by bloc voting and by those States that systematically violate human rights.

We also appreciate the emphasis that the Secretary General's report places on dealing with the issue of terrorism, particularly including its call on all states that have not yet done so to accede to the twelve existing counter-terrorism conventions, and the completion—without delay—of an international convention for the suppression of acts of nuclear terrorism. We welcome the position that there is no justification for the targeting and killing of civilians, and continue to believe that a definition of terrorism needs to exclude state military operations. We also recognize that any definition or other language to be included in the comprehensive convention on terrorism will need to be worked out by states in the context of the negotiations of that convention.

We welcome the Secretary General's acknowledgment that the proliferation of weapons of mass destruction is a real and growing threat. We also welcome the Secretary General's reiteration of the importance of the Nuclear Nonproliferation Treaty (NPT) and the specific reference to "the crisis of confidence and compliance" facing the Treaty. States failing to abide by their treaty obligations have created a serious challenge for the nonproliferation regime that must be addressed.

The U.S. is pleased to see the support given to the Proliferation Security Initiative and to UN Security Council Resolution 1540 as useful new initiatives to combat the threat of WMD proliferation, including by non-State actors. We also welcome the report's call for universal adoption of the International Atomic Energy Agency (IAEA) Additional Protocol and its enrichment and reprocessing programs because of the proliferation dangers they pose. We support the report's focus on national controls against WMD delivery systems, as the proliferation of missiles and related technologies to unstable countries is an area of great concern to the United States.

The United States also welcomes the report's emphasis on additional steps to address destabilizing conventional weapons. We believe, however, that the discussion of nuclear states as bearing the greatest burden for addressing the proliferation and disarmament challenges facing the international community is incorrectly cast.

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We welcome the Secretary-General's assertion that Article 51 of the Charter should not be changed. The Secretary General's report makes the key point that a state need not wait until it is actually attacked in order to use force in self-defense, which is to say that there is a right of anticipatory self-defense in appropriate circumstances. Anticipatory action is an element of the inherent right of self-defense that remains lawful under the UN Charter. As we have indicated previously, this right of self-defense must today be understood and applied in the context of the new threats posed by terrorism and weapons of mass destruction that the Secretary General highlights in his report.

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In addition, we urge WTO members to complete the Doha round by the year 2006 if possible. We caution, however, that finding the right structure for open and free markets—one that will contribute positively to increased development and opportunity—is more important than the constraints of a calendar. Further, debt sustainability is about a country's ability to pay in the context of becoming an active partner in global capital markets. We must bear in mind also the role that debt plays as a financing tool for development, and debt financing is only appropriate where there is a reasonable expectation that loans will be repaid. The approach outlined in the report would set back many countries' progress toward achieving or regaining access to capital markets.

Recent investigations of mismanagement and wrongdoing, including in peacekeeping operations, are causes for concern and have underscored the need for greater transparency and accountability within the UN. We therefore strongly support strengthening the authority and independence of the Office of Internal Oversight Services (OIOS) as a means to accomplish this.

The United States supports Security Council reform, provided it enhances the effectiveness of the Council; we remain open to considering all proposals and will evaluate them against that benchmark. As the reform process proceeds, the United States would like to move forward on the basis of broad consensus along the lines we have previously stated and without artificial deadlines.

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**c. Preparation for High-Level Event**

*(1) Statement to the General Assembly*

During preparations for the September meeting of world leaders referred to by the Secretary-General ("High-Level Event"), Ambassador Anne W. Patterson, then Acting U.S. Representative to the United Nations, outlined U.S. proposals for UN reform in an address to the General Assembly on June 22, 2005. Excerpts below provide the views of the United States on management reform and terrorism. The full text of Ambassador Patterson's remarks is available at [www.un.int/usa/05\\_119.htm](http://www.un.int/usa/05_119.htm). See also statement by Ambassador Patterson in the Security Council on May 26, 2005, on post-conflict peacebuilding following adoption of a Security Council Presidential Statement (U.N. Doc. S/PRST/2005/20, available at <http://documents.un.org>) welcoming the "renewed commitment to an improved post-conflict peacebuilding process" demonstrated in the statement; and remarks on August 2, 2005, available at [www.un.int/usa/05\\_147.htm](http://www.un.int/usa/05_147.htm).

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*Management*

Failings in the Oil for Food Program and the UN's inability to prevent peacekeepers from sexually exploiting those they were sent to protect point to management failures.

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Our proposals relate to three themes: accountability and integrity, improved effectiveness, and boosting relevance. To advance these themes, we believe the following specific measures, many of which were suggested in the Gingrich-Mitchell report, need to be implemented:

- Internal Oversight needs to be more independent from the activities it reviews; an oversight board with separate budget authority would help accomplish this.

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- The Secretary-General's authority to waive immunity must be affirmed so that UN officials suspected of committing criminal activities are fully investigated and guilty individuals are held accountable.
- UN activities must be reviewed for continuing relevance as required and new mandates need to be subject to sunseting so they do not continue after they have accomplished their objectives.
- Actions must be taken to reduce administrative and support costs, including meeting expenses, so that resources can be applied to high priority areas.

These initiatives will complement actions of the Secretary-General, who has created an ethics office, established a management performance review board, and enhanced the UN's policy against fraud and corruption. The United States commends these actions and looks forward to learning about the results achieved as they are carried out.

With a more streamlined organization and a firm commitment to accountability and results, the United Nations will be appropriately positioned to perform its role in dealing with the challenges we face.

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#### *Terrorism*

It is time for all UN member states to unequivocally outlaw acts of international terrorism, which is an unacceptable scourge for all countries. We are in broad agreement with the counter-terrorism strategy proposed by the Secretary General, but do not agree with all its elements.

Regarding a definition of terrorism, the U.S. welcomes the position, contained in the Secretary-General's report, that the right to resist occupation does not justify the targeting and killing of civilians. We do not, however, want the effort to come to agreement on a definition of terrorism to distract from the more important task of moving forward on completion of the Comprehensive Convention on International Terrorism. Adoption of the Convention would be an important and symbolic achievement in the UN's global effort to combat terrorism.

We must join together on the occasion of the High-level Event to condemn all deliberate and targeted terrorist attacks against civilians and non-combatants. It is time for all UN Members to recognize that there can be no justification for such attacks, regardless of the cause, motivation, and grievance. We believe that the Outcome Document must include language to this effect. This is a priority for my government.

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*(2) Letters to colleagues*

In August 2005 Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, sent a series of letters to UN Member States conveying U.S. views on the draft Outcome Document being prepared for the High Level Event. The full texts of the letters, which also include suggested changes to the then current draft of the Outcome Document, are available at [www.usunnewyork.usmission.gov/reform-un.htm](http://www.usunnewyork.usmission.gov/reform-un.htm). See e.2. (ii) below and Chapter 6.D.2.a., concerning responsibility to protect and Millennium Development Goals, respectively.

**d. 2005 World Summit Outcome Document**

At the conclusion of the High-Level Event held September 15-16, 2005, the UN General Assembly adopted the 2005 World Summit Outcome ("Outcome Document") by consensus on September 16, 2005. U.N. Doc. A/RES/60/1. In a press briefing on September 13, 2005, Under Secretary of State for Political Affairs R. Nicholas Burns and Assistant Secretary for International Organization Affairs Kristen Silverberg expressed U.S. support for the final document and commented on specific aspects.

Excerpts follow from Under Secretary Burns' remarks on the process and substance of the negotiations. The full text of the press briefing is available at [www.state.gov/p/us/rm/2005/53087.htm](http://www.state.gov/p/us/rm/2005/53087.htm). See also fact sheet released by the Department of State Bureau of Public Affairs on October 7, 2005, available at [www.state.gov/p/io/fs/57527.htm](http://www.state.gov/p/io/fs/57527.htm).

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A hundred and ninety-one countries agreed to the summit declaration today, which is quite a feat. The United States is very pleased at this outcome. It's in our national interest to see reform be instituted across the board at the United Nations. We believe that this document does this. We believe it's a good step forward for our priority objective of strengthening the United Nations, making it an effective institution—a more effective institution, and allowing the United States to participate in the UN in a very vigorous way as the UN faces a number of challenges.

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The centerpiece of this reform effort for us has always been a strengthening of the Secretariat, of the management of the UN and of the budget of the UN. . . .

But the result of it is that we are going to have, I think, a greatly strengthened United Nations, a UN-wide code of ethics, enhanced whistleblower protection, more extensive financial disclosure for UN officials and stronger internal oversights at the United Nations. There are also budget reforms, including a review of all program mandates older than five years. This is important in light of the Oil-for-Food scandal and the recent revelations of the Volcker Commission, including those last week which point to the need for our tax dollars and the financial contributions of all other countries to be handled in a more efficient way. And this was the centerpiece of the U.S. effort. We told countries over the last couple of weeks that of all the priority reforms, this was the most important to the United States. We fought hard for this. . . .

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The second reform is on terrorism. If you look at this summit document, this outcome document, there is no hiding place for terrorists. This was an important international debate that took place. Some countries, some leaders, argued that national liberation movements should be an exception to sanctions for terrorist activity. Others argued that there were times when even civilians might be targeted by national liberation movements. We took the position that there was no justification, there could never be a justification,

for an act of terrorism, that there could be no ideological or political justification. And you'll see that this document reflects that and we've very pleased by the language.

We fought very hard for a human rights council to replace the discredited Human Rights Commission which exists in Geneva. That commission is an institution where the major violators of human rights in the world sit in judgment of democratic countries. Sudan and Zimbabwe have sat on the Human Rights Commission in Geneva. And we have taken the position, along with many other countries and the Secretary General, that we had to abolish that commission and create in its place a new council that would actually have standards, we hope, when it is finally—when all the rules are written, where countries that have not violated human rights sit on the council and those that are human rights violators do not have a place in the council.

We made limited progress in this area. This was hotly debated, as you can imagine, by a number of delegations. We hope very much in agreeing to create the council, which the summit document does, that when we write the rules of the council and the bylaws of the council and frame it, it's going to have that democratic cast which is so important to us because we can no longer support the Human Rights Commission in Geneva. . . .

. . . Development received a lot of press attention and public attention, and we were very pleased to see the results on development. I know Secretary Rice felt very strongly that the United States should join the international consensus, that we should all stand together against poverty and for poverty alleviation and for the success of some of the Millennium Development Goals of five years ago. And so last week Ambassador Bolton, in effect, put an olive branch on the table and said that the United States would agree with language that we had previously felt should not be in the document. Why is that? It's because we signed up to the Millennium Development Goals. We believe that fighting HIV/AIDS, poverty and the other development parameters that are listed here are very important. As you all know, we also believe that there is more than one way to achieve those goals. . . .

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And finally let me just cite the peace building commission, which is a new innovation of the United Nations. As we look back over the last ten years at the conflicts in Bosnia, Kosovo, Afghanistan and Iraq, there is no question that a weakness in the international system was our inability to very quickly after the fighting stopped enter a country and try to unite the civilian and military efforts, try to put forward a international UN operation to rebuild a country and to begin communicating development aid. The creation of the peace building council is now a new institution of the United Nations. . . .

In providing an explanation of the U.S. vote in favor of adoption of the Outcome Document, Ambassador Bolton stated:

. . . We are pleased that the Member States have agreed to denounce terrorism in all its forms, advance the cause of development, reform the management of the UN, establish a Peacebuilding Commission, and create a Human Rights Council.

I do wish to make one point clear. The United States understands that reference to the International Conference on Population and Development and the Beijing Declaration and Platform for Action, and the use of the phrase “reproductive health” in paragraphs 57G and 58C do not create any rights and cannot be interpreted to constitute support, endorsement, or promotion of abortion.

The full text of Ambassador Bolton’s remarks, delivered September 16, 2005, to the General Assembly, is available at [www.un.int/usa/05\\_159.htm](http://www.un.int/usa/05_159.htm).

#### ***e. Implementation***

Efforts to implement the Outcome Document began in the remaining months of 2005 in the General Assembly and the Security Council. Several U.S. statements on key issues are excerpted below. *See also* statements by Ambassador Anne W. Patterson, Deputy U.S. Representative to the United Nations, on implementing measures related to the Office of Internal Oversight

Services, in the Fifth Committee, October 13, 2005, available at [www.usunnewyork.usmission.gov/05\\_172.htm](http://www.usunnewyork.usmission.gov/05_172.htm), and on budgetary implications of the mandate review from the Outcome Document, in the Fifth Committee, October 27, 2005, available at [www.usunnewyork.usmission.gov/05\\_188.htm](http://www.usunnewyork.usmission.gov/05_188.htm).

(1) *Peacebuilding Commission*

On December 20, 2005, Ambassador Bolton addressed the UN General Assembly to provide the U.S. views in supporting Security Council Resolution 1645 and General Assembly Resolution 60/180, in which the two bodies acting concurrently on that date established the Peacebuilding Commission ("PBC"). Ambassador Bolton's remarks, excerpted below, are available at [www.usunnewyork.usmission.gov/05\\_265.htm](http://www.usunnewyork.usmission.gov/05_265.htm). See also Chapter 17.C.1. and [www.un.org/peace/peacebuilding](http://www.un.org/peace/peacebuilding).

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The United States was pleased to support the concurrent resolutions in the Security Council and the General Assembly, which have now established the Peace Building Commission (PBC). . . .

We must now turn our attention to seeing that the PBC in fact now realizes its potential to make an important contribution to the work of the Security Council to build sustainable peace in the aftermath of immediate threats to international peace and security. The resolution emphasizes that the PBC must take into account the primary responsibility of the Security Council under the Charter for the maintenance of international peace and security, which would include the Council's role in the coordination of efforts to maintain peace and security on the ground.

Our common imperative is to create a cost-effective, efficient advisory institution, capable of ensuring the successful transition from peacekeeping operations into peacebuilding, providing important advice but not duplicating work. The PBC can most effectively help prevent nations from sliding back into conflict by ensuring that the Security Council is aware of all the elements that are essential to achieving sustainable peace in a given nation, from

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immediate humanitarian assistance to transitional security to national efforts at institution building. This will assist the Security Council as it develops the UN mandate for the countries under consideration or oversees the implementation of the mandate already in place. Meeting in country-specific working groups, the PBC should advise the Council on facilitating coordination of international efforts in post-conflict settings, both within and without the UN system.

We underline that the resolutions provide that, with respect to matters being considered by the Security Council, the PBC's main purpose will be to provide advice at the Council's request. The authority of the Security Council to decide whether and when the PBC should be asked to address such matters is important to ensure that the Council may effectively exercise its primary responsibility under the Charter for the maintenance of international peace and security. This is also necessary for the PBC to be effective. In light of this main purpose of the PBC, we expect that its Organizational Committee will include on the Commission's agenda any such matter requested by the Security Council.

We also note that the resolutions provide that the PBC shall meet in various configurations, and shall act in all matters on the basis of consensus of its members. This consensus requirement applies to all of the various configurations in which the PBC may meet, including, for example, to the Organizational Committee and to country-specific meetings. It also applies to all matters, including any decisions on matters to be considered by the PBC or advice the PBC provides.

We stress that Paragraph 27 of the resolutions provides that a review of the PBC's arrangements after five years, and any changes resulting from such a review, will be decided under the same procedures referred to in Paragraph 1 of the resolutions. The need for approval by both the Security Council and the General Assembly for any changes in the PBC's governing arrangements is of course inherent in the manner in which the Commission is being created, and is not limited to changes resulting from the five-year review that is mentioned specifically in Paragraph 27. The five-year review will offer an important opportunity to determine whether the



Commission is working well, needs revision, or is not meeting its intended purpose.

\* \* \* \*

(2) *Security Council*

(i) *Security Council reform*

On November 10, 2005, Ambassador Bolton addressed the General Assembly on Security Council Reform. His remarks, excerpted below, are available at [www.un.int/usa/05\\_214.htm](http://www.un.int/usa/05_214.htm).

\* \* \* \*

The United States supports an expansion of the Security Council that can contribute to its strength and effectiveness, and is open to various options to realize such a reform. Earlier this year, the U.S. made a specific proposal for a modest expansion of the Council by adding a combination of permanent and non-permanent members. We stand by that proposal and are open to suggestions of other countries.

As Secretary Rice has said, “We want this important body to reflect the world as it is in 2005—not as it was in 1945.” We must also ensure that new permanent members are supremely qualified to undertake the tremendous duties and responsibilities they will assume. In our view, qualified nations should meet criteria in the following areas: size of economy and population; military capacity; contributions to peacekeeping operations; commitment to democracy and human rights; financial contributions to the United Nations; non-proliferation and counterterrorism records; and equitable geographic balance.

We have long supported a permanent seat for Japan. We hope very much that Japan will be able to take a permanent seat at the earliest possible opportunity. And we believe that developing countries deserve greater representation on this body. As I have already noted, particular emphasis should be placed on criteria for membership. And those member states who most clearly meet those criteria should be allowed to serve on the Council, even where there is a disagreement over other candidates.

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The United States is prepared to engage fully in an effort to find a proposal that allows for agreement on expansion of the Council. However, too large an expansion would risk making it unable to quickly address challenges to international peace and security.

We will not, however, support a return to any of the three proposals introduced in the 59th General Assembly. . . .

Because Security Council expansion requires amendment of the Charter, which requires approval of two-thirds of the membership and by the five current Permanent Members, in accordance with their own respective constitutional procedures, we need to prepare the way carefully to ensure that whatever approach we adopt can and will gain the requisite support of Member States during the ratification process.

### *(ii) Role in responsibility to protect*

In the 2005 World Summit Outcome Document, the United States supported inclusion of language addressing the international “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Paragraphs 138 and 139 of the Outcome Document, A/Res/60/1, provide as follows under that heading.

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138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accor-

dance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

In a letter to UN colleagues in preparation for the World Summit, dated August 30, 2005, Ambassador Bolton set forth U.S. "principles relating to the section on 'responsibility to protect' in the [then] draft document." The full text of the letter, excerpted below, is available at [www.usunnewyork.usmission.gov/reform-un.htm](http://www.usunnewyork.usmission.gov/reform-un.htm).

... We believe there exists a widespread consensus in support of these principles which will enable us to reach agreement on an appropriate text.

The international community has a particular interest and role to play in cases involving genocide, ethnic cleansing, crimes against humanity and other large-scale atrocities in which national authorities are unwilling or unable to protect their citizens. The risk in such cases to international peace and security is clear, and the international community must be prepared to use diplomatic, humanitarian, and other peaceful measures to protect civilian populations against such atrocities. In such cases, the role of the Security Council is critical. In carrying out that responsibility, the Council may, and is fully empowered to, take action under the Charter, including enforcement action, if so required. We reject the argument that the principle of non-intervention precludes the Security Council from taking such action. At the same time, we note that the Charter has

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never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace.

Accordingly, we believe just as strongly that a determination as to what particular measures to adopt in specific cases cannot be predetermined in the abstract but should remain a decision within the purview of the Security Council. For its part, the United States stands ready to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter and, as appropriate, in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations.

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### (3) *Human Rights Council*

On November 1, 2005, Mark Lagon, Deputy Assistant Secretary of State, Bureau of International Organization Affairs, addressed the Human Rights Council Working Group. Mr. Lagon concluded his remarks by reviewing “the main features of the Human Rights Council as the United States envisions it.” The full text of Mr. Lagon’s remarks is available at [www.usunnewyork.usmission.gov/05\\_196.htm](http://www.usunnewyork.usmission.gov/05_196.htm).

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### **Mandate:**

We believe strongly that the Council should promote the strengthening of Member States’ abilities to implement their human rights commitments, and we request the Office of the High Commissioner to provide human rights related technical assistance to countries.

An effective body must also have the authority to make recommendations to other UN bodies—the General Assembly, of course; but also the UN Security Council.

The resolution should establish the Council’s mandate to respond to urgent or continuing human rights violations.

As discussed earlier, the resolution should direct the Human Rights Council to review the mandates of the existing Special Procedures of the Commission on Human Rights and retain those it deems appropriate.

**Membership:**

The resolution should establish that the Council reflect a diverse regional distribution and have a small enough size to be poised to act to help governments or peoples in need. We believe a 30-member Council would be about right.

We believe that new members of the Council should be elected individually and directly by the General Assembly.

The resolution should emphasize that the members of the Human Rights Council must have a demonstrated commitment to the promotion and protection of human rights

The resolution should require prospective members to submit to the UNGA President a letter that outlines their qualifications for membership.

The resolution should require prospective candidates to receive the specific endorsement of a majority of States in their regional groups via letters from a senior political level to the UNGA President that indicate the qualifications of the potential candidate.

The resolution should stress that no Government against which measures have been imposed and are in effect under Articles 41 or 42 of the UN Charter for human rights-related reasons, that is subject to a UN Security Council Commission of Inquiry, or that is subject to a similar UN Security Council procedures related to human rights may serve on the Council. This minimal disqualifier is simple and sensible, and avoids a controversial debate over complicated or sweeping criteria.

**Working Methods/Other Issues:**

The resolution should call for the Human Rights Council to be a standing body that meets multiple times per year in Geneva (and we recommend every two months for two week sessions). The Council's Chair or a simple majority of members, or the High Com-

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missioner for Human Rights or the Secretary-General would each be able to call for additional sessions as needed.

As discussed earlier, the resolution should mandate the Human Rights Council to set its own agenda and working methods.

The resolution should suspend further meetings of the Sub-commission for the Promotion and Protection on Human Rights until the Human Rights Council makes a determination about what subsidiary bodies it wishes to create.

The resolution should come for action before the UN General Assembly by December 31, 2005.

### 2. UN Environment Program

On December 13, 2005, U.S. Adviser Samuel Kotis provided the explanation of the U.S. position on draft resolution A/C.2/60/L.60, "Report of the Governing Council of the UN Environment Program ('UNEP')," in the Second Committee. Mr. Kotis' statement, set forth below, is available at [www.un.int/usa/05\\_244.htm](http://www.un.int/usa/05_244.htm).

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The United States supports incorporating environmental concerns into development work. With regards to operative paragraph 2 on international environmental cooperation, the United States believes that the existing system of multilateral environmental agreements reflects a good balance of coordination and decentralization. The principal responsibility for improving coordination on environmental issues should remain with national governments, and not with a supranational authority. Thus, the United States prefers to focus on improving UNEP, not changing its status.

With respect to operative paragraph 9, the U.S. notes that UNEP is funded principally through voluntary contributions. The U.S. supports this arrangement. In that regard, the United States believes that the amount of funding UNEP receives from the UN regular budget funds should decrease.

## **B. OTHER ISSUES**

### **1. Responsibility of International Organizations**

On October 25, 2005, Todd Buchwald, Assistant Legal Adviser for United Nations Affairs, addressed the Sixth Committee (Legal) on Agenda Item 80, Report of the International Law Commission of its 57th Session—Expulsion of Aliens and Responsibility of International Organizations. Excerpts below on the issue of international organizations provide the views of the United States, particularly on distinctions between states and international organizations in this context.

The full text of Mr. Buchwald's statement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The ILC report is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm); the report of the Sixth Committee for the relevant session is found in U.N. Doc. A/C.6/60/SR.12, which includes the substance of the U.S. statement at 5-6, available at <http://documents.un.org>. For Mr. Buchwald's statement on expulsion of aliens, see Chapter 1.C.4.

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With respect to the issue of responsibility of international organization, this issue is complex. As we have said in the past, international organizations—as opposed to states, which share fundamental qualities—vary greatly in their functions and structures, and this diversity makes difficult the development of any set of articles in this area that attempts to set forth uniform rules. As one example, the relationship between a government official and his country is significantly different than the relationship between an individual and the international organization that employs him. In light of such differences, we believe that it is not apparent that principles in this area should simply parallel the rules set forth with respect to states in the draft articles on State Responsibility, and we are hopeful that the Commission—as it continues its work—will place particular emphasis on relevant practice.

First, under the draft articles on State Responsibility, in order for State A to incur vicarious responsibility—that is, responsibility

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for aiding/assisting or directing/controlling State B in doing an act—the act in question must be internationally wrongful if committed by State A itself. However, because international organizations vary greatly in what they are authorized to do, this condition may operate quite differently when we try to apply it to vicarious liability of international organizations. As an example, under Articles 12 and 13 of the provisional articles on responsibility of international organizations, one could imagine an international organization that is authorized to provide assistance for states to take certain kinds of actions, but is not authorized to take such actions itself, so that the actual taking of the action by the international organization could in this sense be said to be internationally wrongful. However, it is not evident that the provision of such assistance by such an international organization should be a trigger for international responsibility. It is true that, for there to be responsibility under Articles 12 and 13, the state in question would need to be acting in breach of an international obligation. But it is not clear that this would provide a sufficient safeguard when it is the responsibility of the international organization that we are considering. There may be a variety of reasons why it is unlawful for a particular state to act in a certain way, and a state may in fact have conflicting obligations—for example, if it has an obligation under one treaty to take a certain action, and an obligation under an agreement constituting an international organization or under some other treaty not to take the action. It thus appears to us that this is an area that may merit further reflection.

Second, the provisional articles on aiding/assisting and directing/controlling an internationally wrongful act turn on whether an international organization has taken action “with knowledge” of the circumstances of an internationally wrongful act. Once again, these provisional articles are drawn from the draft articles on State Responsibility. But such a requirement operates very differently on an international organization than it does on a state. For example, when thinking about an international organization, whose “knowledge” are we actually talking about? An international organization does not take direction from its secretariat or professional staff in the way that a state takes direction from its leaders and other employees, thus making it precarious to base a test on what



an international organization knows or does not know. In the case of international organizations, it is the states that constitute and direct the action of an international organization, and each state may have a very different assessment of the legality of a contemplated course of action.

Third, we are looking closely at draft Article 15, which deals with situations in which an international organization recommends, authorizes or adopts a binding decision for a state to take an action that would circumvent an obligation of the international organization. This is meant to cover cases beyond those already covered by the provisional articles on aiding/assisting, directing/controlling or coercing. In connection with what we have said above, we have questions about what it means for an international organization to be circumventing one of its obligations that are similar to our questions about what it means for an act by an international organization to have been internationally wrongful. It may thus be that it would be helpful for the Commission to make clearer the intended meaning of *circumvention*. But Article 15 goes farther in that it does not require, as a condition for an international organiz[ation] incurring liability, that the state to which the recommendation, authorization or decision is directed must be prohibited from undertaking the action in question. It appears to follow that, under the provisional articles, an international organization could be liable for directing—or even authorizing or recommending—that a state take action that it is in fact lawful for the state to undertake. It is not evident to us the practice or policy considerations upon which such a principle would be based.

Fourth, it is hard to see in any case how authorizations or recommendations could trigger liability, at least beyond principles governing aiding/assisting, directing/controlling or coercing. In the ordinary course of events, authorizations or recommendations can be carried out in a variety of ways, and—at least so long as we are not talking about situations in which an international organization is aiding/assisting, directing/controlling or coercing, which are issues covered by separate provisional articles in the draft—it seems illogical to hold an international organization responsible if a state implements in an unlawful manner recommendations or authoriza-

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tions that it could have implemented in a lawful manner (or could simply have freely decided not to implement).

Fifth, we are assessing our views as to whether it would be beneficial for the provisional articles to account more explicitly for the fact that binding decisions, authorizations or recommendations of an international organization can substantively affect the underlying legal obligations of states to which they are addressed in a way that decisions, authorizations or recommendations of states rarely can. This is the situation for example in the context of the Charter and decisions under Chapter VII, but it may also be true with respect to other international organizations, the decisions of which can affect at least the legal rights and obligations of the member states to each other. In other words, the fact that an international organization takes an action may result in a situation in which a state is no longer prohibited from taking an otherwise prohibited action. Among other things, this suggests that the issues connected with analyzing the responsibility of an international organization toward its members differ in practice from those connected with analyzing its responsibility toward non-members.

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### 2. Organization of American States

#### *a. General Assembly meeting in Fort Lauderdale, Florida*

The United States hosted the thirty-fifth regular session of the General Assembly of the Organization of American States ("OAS") in Fort Lauderdale, Florida, from June 5-7, 2005. On March 24, 2005, the United States and the OAS entered into an agreement regarding obligations of each of the parties for funding and other administrative matters and confirming the applicable privileges and immunities of members of the delegations of the OAS member states to the General Assembly. The text of the agreement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

**b. Characterization of OAS charter**

On June 7, 2005, the OAS General Assembly adopted a resolution, "Obligation of Member States to Respect the Rules and Principles of International Law Contained in the OAS Charter in Order to Preserve and Strengthen Peace in the Hemisphere." AG/RES.2150 (XXXV-O/05), available in Proceedings of the Thirty-Fifth Regular Session of the Organization of American States General Assembly, Volume I, OEA/Ser.P/XXXV-O.2, at [www.oas.org/juridico/English/gao5/gao5.doc](http://www.oas.org/juridico/English/gao5/gao5.doc).

Operative paragraph 1 of the resolution provided:

To reiterate the content of Article 3 of the OAS Charter, which mentions, inter alia, the following principles that guarantee regional peace and constitute the foundations of the Organization of American States: full respect for the legal equality of states, sovereignty, political independence, territorial integrity, and nonintervention.

The United States explained its position on this and certain preambular paragraphs in the resolution in a footnote as follows:

The United States observes that this resolution includes partially inaccurate characterizations of the OAS Charter and international law in its third, fourth, and fifth preambular paragraphs, and its first operative paragraph. The United States is a party to the Charter, and accepts the Charter's statements on the subjects of those paragraphs. However, the United States cannot join consensus on this resolution to the degree that those paragraphs inaccurately characterize the Charter and international law.

**3. International Coffee Organization**

On February 5, 2005, Secretary of State Rice announced that the United States had "acceded to the 2001 International Coffee Agreement, and has become a member of the Interna-

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tional Coffee Organization effective February 3, 2005.” Secretary Rice continued:

The International Coffee Organization has undertaken impressive reforms in recent years to strengthen its market orientation, build programs to help coffee farmers improve quality, efficiency and access to markets, and streamline the global coffee trade. It is a valuable forum in which to address the full range of issues affecting coffee production, trade and consumption. We look forward to working closely with our trading partners in the Organization to enhance development efforts and open markets.

The full text of the Secretary’s remarks, in Ankara, Turkey, is available at [www.state.gov/secretary/rm/2005/41849.htm](http://www.state.gov/secretary/rm/2005/41849.htm).

### Cross References

*Establishment of Western and Central Pacific Ocean Commission*, Chapter 13.A.2.c.(1).

*Strengthening Inter-American Tuna Commission*, Chapter 13.A.2.c.(2).

*Oil-for-food investigations*, Chapter 16.1.b.

*UN access to documents held by U.S. Congressional committee*, Chapter 16.1.b.(2)(ii).

*Role of the UN in Middle East peace process*, Chapter 17.A.1.c.

*IAEA Special Committee on Safeguards and Verification*, Chapter 18.C.2.c.

## CHAPTER 8

# International Claims and State Responsibility

### A. GOVERNMENT-TO-GOVERNMENT CLAIMS

#### Dabhol Arbitration

In November 2004 the United States initiated arbitration proceedings against the Government of India ("GOI") to recover losses incurred by the U.S. Overseas Private Investment Corporation ("OPIC") under its political risk insurance policies extended to investors and lenders to the Dabhol Project in India. Pursuant to the Investment Incentive Agreement between the Government of the United States of America and the Government of India, the Permanent Court of Arbitration in The Hague appointed the arbitrators. *See Digest 2004* at 424-30.

On July 12, 2005, the GOI settled the OPIC claims arising out of the Dabhol project, and the U.S., OPIC, and the GOI signed a letter to the Permanent Court of Arbitration agreeing to the withdrawal of the arbitration.

### B. CLAIMS OF INDIVIDUALS

#### 1. Nonjusticiable Political Question

##### a. *Whiteman v. Dorotheum GmbH & Co KG*

On November 23, 2005, the U.S. Court of Appeals for the Second Circuit dismissed claims against the government of Austria and certain of its instrumentalities arising from

“sweeping confiscations of property that were part of the systematic Nazi victimization of Austrian Jews between 1938 and 1945.” *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57 (2d Cir. 2005). The case was before the court on remand from the Supreme Court following its decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), discussed in *Digest 2004* at 463-72. The Second Circuit noted that *Altmann* had resolved one question, finding that the FSIA applied retroactively, “but reserved the question of how much deference should be accorded to views of the Executive Branch in asserting jurisdiction over a foreign sovereign.”

The United States had filed a letter brief as *amicus curiae* in *Whiteman* on September 9, 2004, reiterating the U.S. view expressed in earlier submissions that it would be “in the foreign policy interests of the United States for this action to be dismissed on any valid legal ground.” See *Digest 2004* at 472-75. Excerpts below from the Second Circuit opinion explain its decision, deferring to the executive branch views and dismissing the case as nonjusticiable under the political question doctrine.

We are asked by the Republic of Austria—and by the United States and the American Council for Equal Compensation of Nazi Victims from Austria, as *amici curiae*—to dismiss this case, which is reported to be the sole remaining obstacle to the implementation of a fund to compensate Austrian Jewish victims of the Nazi regime for Holocaust-related property deprivations. That fund was created in 2001 pursuant to an executive agreement between the United States and Austria.

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#### I. The Effect of *Altmann*

On remand, we must first determine how *Altmann* informs our disposition of this case. In *Altmann*, the Supreme Court departed from what it termed a pre-existing “antiretroactivity presumption,” 541 U.S. at 696, and held that the FSIA, including its exceptions, is applicable to conduct that preceded its enactment. . . .

Yet the *Altmann* Court “emphasized the narrowness of [its] holding,” attributable in part to the particular posture assumed by the Executive Branch in that case. *Id.* at 700-02. The Court underscored that the United States Government had chosen *not* to submit a statement of its foreign policy interests implicated by the exercise of jurisdiction in *Altmann*. *Id.* at 701-02 & n.22. The Court then advised that in future cases, “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” *Id.* at 702 (footnote omitted). Since no such State Department opinion was expressed in *Altmann*, the Court declined to explicate further the circumstances under which it would be appropriate for a federal court to defer to a statement of foreign policy interests of the United States in deciding whether to assert jurisdiction over a foreign sovereign *in a particular case*.

A few weeks after its *Altmann* decision, the Court again urged “case-specific deference to the political branches” in *Sosa*, 124 S. Ct. at 2766 n. 21. Relying on *Altmann*, the *Sosa* Court stated (albeit in dicta) that when the United States Government submits statements of interest to federal courts, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” *Id.* The Court again did not specify how much weight we should give to statements of United States foreign policy interests, or under what circumstances.

## II. Deference to the United States Statement of Interest

. . . We are . . . squarely faced with the issue reserved in *Altmann* and *Sosa*—when, and to what extent, should the stated foreign policy interests of the United States be accorded deference. In the circumstances presented in this case, we hold that deference is appropriate.

Judicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the “political question” doctrine, which we apply here. *See, e.g., Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (“Not only does resolution of

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[foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." (footnotes omitted)). Yet the Supreme Court has warned that

it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

*Id.* at 211-12.

\* \* \* \*

Our inquiry into the proper deference to be accorded to the United States Statement of Interest is guided by our application of the political question doctrine because this doctrine "reflects the judiciary's concerns regarding separation of powers," *Kadic*, 70 F.3d at 249. Our resolution of this case under the political question doctrine is greatly reinforced by the historic deference due to the Executive in the conduct of the foreign relations of the United States, as highlighted by the Supreme Court's recent guidance in *Altmann* and *Sosa*. See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) (recognizing the historic deference accorded to "decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"). We further note that our decisions and those of other courts considering the application of the political question doctrine have properly relied on the views of the United States Government, as expressed in its statements of interest. See, e.g., *Kadic*, 70 F.3d at 250; see also *Hwang Geum Joo*, 413 F.3d at 48 (deferring to the foreign policy views of the Executive



Branch, as expressed “in a thorough and persuasive Statement of Interest”).

... [I]t is clear that this case meets [one of] the . . . test[s] [for inquiry under the political question doctrine established in *Baker*]; in other words, “a court’s undertaking independent resolution” of *this claim* is impossible “without expressing lack of the respect due” the Executive Branch. To begin with, the foreign policy interests asserted by the Executive with respect to plaintiffs’ particular claims are “due” the utmost “respect” because they are offered to us pursuant to executive agreements concluded in the exercise of the President’s constitutional authority to conduct foreign affairs. . . . [F]ifty years of international negotiations have culminated in the signing of the [General Settlement Fund (“GSF”)] Agreement, which is accompanied by an exchange of diplomatic notes that constitutes an executive agreement between the Government of the United States and the Austrian Federal Government. *See* United States Statement of Interest, at 6 n.4. The President’s authority to settle claims through such executive agreements has long been recognized by courts, *see, e.g., Garamendi*, 539 U.S. at 415 (“The President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.”), and acquiesced to by Congress, *see Dames & Moore v. Regan*, 453 U.S. 654, 680-82, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981)—particularly where, as here, “the means chosen by the President . . . provided an alternative forum, . . . which is capable of providing meaningful relief,” *id.* at 686-87. The United States Government represents to us *in this case* that the GSF does not merely “provide meaningful relief,” *id.* at 687, but indeed “provides the best mechanism for resolving claims such as plaintiffs’.” United States Supplemental Letter, at 8.

We further conclude that “a court’s undertaking independent resolution” of plaintiffs’ claims would “express[] [a] lack of . . . respect,” *Baker*, 369 U.S. at 217, for the foreign policy interests of the United States as expressed in the GSF Agreement and elaborated upon in the United States Statement of Interest and Supplemental Letter. This is the “final case” holding up the implementation of the GSF. United States Supplemental Letter, at 6. In the almost five

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years since its initiation, this litigation has not moved beyond the threshold phase. . . . Moreover, as the [first] United States Statement of Interest underscores, “plaintiffs in this case face numerous potential legal hurdles” in the future, including “justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, as well as difficulties of proof inherent in these claims which originated more than 50 years ago and the various potential practical and legal obstacles to certification of a class of heirs.” United States Statement of Interest, at 22. . . .

. . . We are also particularly mindful of the United States’ representation that the implementation of the GSF Agreement would advance the United States’ foreign relations with Austria, as well as with Israel and Western, Central, and Eastern European nations. *See id.* at 17-19; *see also* Background III(c), *ante*. These foreign policy interests—which, we are informed, have animated the Government’s “half-century effort” culminating in the signing of two recent executive agreements, United States Statement of Interest, at 19—are precisely ones that “defy judicial application,” “involve the exercise of a discretion demonstrably committed to the executive,” and “uniquely demand single-voiced statement of the Government’s views,” *Baker*, 369 U.S. at 211. In short, they counsel strongly in favor of deference to the Executive.

We therefore hold that plaintiffs’ claims against Austria and its instrumentalities must be dismissed as nonjusticiable under the political question doctrine. In so holding, we defer to a United States statement of foreign policy interests *in this particular case*, which is the one remaining litigation obstacle to the implementation of the GSF Agreement. We conclude that we cannot “undertake independent resolution without expressing lack of the respect due” the Executive Branch, *id.* at 217, because (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of the claims in question; (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated to this Court that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of this case.

Due to the “case-specific” nature of our “deference to the political branches,” *Sosa*, 124 S. Ct. at 2766 n. 21, we need not determine whether any one of these factors is necessary or sufficient for dismissal, and we merely conclude that the dismissal of a claim against a foreign sovereign is appropriate in the circumstances presented to us here.

\* \* \* \*

**b. Huang Geum Joo v. Japan**

On June 28, 2005, the U.S. Court of Appeals for the District of Columbia Circuit dismissed a case brought by 15 “comfort women” against Japan and the Japanese Minister of Foreign Affairs, finding that the case presented nonjusticiable political questions. *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005). As explained in the D.C. Circuit opinion, “the appellants are 15 women from China, Taiwan, South Korea, and the Philippines; in 2000 they sued Japan in the district court under the Alien Tort Statute, 28 U.S.C. 1350, ‘seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II,’ in violation of ‘both positive and customary law.’”

As with *Whiteman*, *supra*, *Hwang Geum Joo* was remanded by the Supreme Court following its decision in *Altmann*. The United States filed a supplemental *amicus* brief on remand, arguing that the claims did not fall within the commercial activity exception to the FSIA and that “[t]he foreign policy determination of the political branches that wartime claims against Japan should be resolved exclusively through government-to-government negotiations may properly be given full effect in accord with . . . *Altmann* and subsequent cases.” See *Digest 2004* at 475-76 and 483; see also *Digest 2002* at 494-503 and *Digest 2001* at 430-57.

Excerpts follow from the court’s analysis. The United States did not file on appellants’ subsequent petition to the Supreme Court for a writ of certiorari, which was denied. 126 S. Ct. 1418 (2006).

\* \* \* \*

The War in the Pacific has been over for 60 years, and Japan has long since signed a peace treaty with each of the countries from which the appellants come. The appellants maintain those treaties preserved, and Japan maintains they extinguished, war claims made by citizens of those countries against Japan. As explained below, our Constitution does not vest the authority to resolve that dispute in the courts. Rather, we defer to the judgment of the Executive Branch of the United States Government, which represents, in a thorough and persuasive Statement of Interest, that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States. *Baker v. Carr*, 369 U.S. 186 (1962), remains the starting point for analysis under the political question doctrine. There the Supreme Court explained that “[p]rominent on the surface of any case held to involve a political question is found” at least one of six factors, the first of which is “a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . .” *Id.* at 217.

Of course, questions concerning foreign relations “frequently . . . involve the exercise of a discretion demonstrably committed to the executive or legislature”; the Court cautioned, however, that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Id.* at 211. Courts are therefore to focus their analysis upon “the particular question posed, in terms of the history of its management by the political branches.” *Id.*

The Supreme Court has recently given further direction more closely related to the legal and factual circumstances of this case: A policy of “case-specific deference to the political branches” may be appropriate in cases brought under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004). . . .

With these principles in mind, we turn to “the particular question posed” in this case, *Baker*, 369 U.S. at 211, namely, whether the series of treaties Japan concluded in order to secure the peace after World War II foreclosed the appellants’ claims. As we explained in our previous opinion, Article 14 of the 1951 Treaty of Peace between Japan and the Allied Powers, 3 U.S.T. 3169, “ex-

pressly waives . . . ‘all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.’” 332 F.3d at 685.

The appellants from China, Taiwan, and South Korea argue that because their governments were not parties to the 1951 Treaty, the waiver of claims provision in Article 14 did not extinguish their claims. Neither, they argue, did the subsequent agreements between Japan and the governments of their countries. Although the appellants acknowledge that “it may seem anomalous that aliens may sue where similar claims of U.S. nationals are waived,” they argue “that is precisely the result contemplated by . . . the [Alien Tort Statute], 28 U.S.C. § 1350.”

“Anomalous” is an understatement. *See* Statement of Interest of the United States at 28 (“it manifestly was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan . . . while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals”). Even if we assume, however, as the appellants contend, that the 1951 Treaty does not of its own force deprive the courts of the United States of jurisdiction over their claims, it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits. Indeed, Article 26 of the Treaty obligated Japan to enter “bilateral” peace treaties with non-Allied states “on the same or substantially the same terms as are provided for in the present treaty,” which indicates the Allied Powers expected Japan to resolve other states’ claims, like their own, through government-to-government agreement. To the extent the subsequent treaties between Japan and the governments of the appellants’ countries resolved the claims of their respective nationals, the 1951 Treaty at a minimum obliges the courts of the United States not to disregard those bilateral resolutions.

First, the Republic of the Philippines, as an Allied Power, was a signatory to the 1951 Treaty itself and thus at least purported to waive the claims of its nationals. 136 U.N.T.S. at 137, ratified 260 U.N.T.S. 450. Then in 1952 Japan reached an agreement with the Republic of China (Taiwan), 138 U.N.T.S. 37, which did not expressly mention the settlement of individual claims but did state in

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Article XI that “[u]nless otherwise provided for in the present Treaty . . . any problem arising between [the parties] as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the [1951] Treaty.” In 1965 Japan and the Republic of Korea (South Korea) entered into an agreement providing that “the problem concerning property, rights, and interests of the two Contracting Parties and their nationals . . . and concerning claims between the Contracting Parties and their nationals . . . is settled completely and finally.” 583 U.N.T.S. 258, 260 (Art. II, § 1).

Finally, in 1972 Japan and the People’s Republic of China issued a Joint Communiqué in which China “renounce[d] its demand for war reparation from Japan,” and in 1978 Japan and China affirmed in a formal treaty of peace that “the principles set out in [the Joint Communiqué] should be strictly observed.” 1225 U.N.T.S. 269.

As evidenced by the 1951 Treaty itself, when negotiating peace treaties,

governments have dealt with . . . private claims as their own, treating them as national assets, and as counters, ‘chips’, in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts.

Louis Henkin, *Foreign Affairs and the Constitution* 300 (2d edition 1996); see *Dames and Moore v. Regan*, 453 U.S. 654, 688 (1981) (upholding President’s authority to settle claims of citizens as “a necessary incident to the resolution of a major foreign policy dispute between our country and another [at least] where . . . Congress acquiesced in the President’s action”); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (acknowledging “President’s authority to provide for settling claims in winding up international hostilities”).

The governments of the appellants’ countries apparently had the authority—at least the appellants do not contest the point—to bargain away their private claims in negotiating a peace with Japan

and, as we noted previously, it appears “in fact [they] did.” 332 F.3d at 685. Indeed, Professor Henkin reports that “except as an agreement might provide otherwise, international claim settlements generally wipe out the underlying private debt, terminating any recourse under domestic law as well.” *Above* at 300. The Supreme Court first expressed the same understanding with respect to the Treaty of Paris ending the War of Independence, which expressly provided for the preservation of private claims. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796), a case brought by a British subject to recover a debt confiscated by the Commonwealth of Virginia during the war, Justice Chase wrote:

I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violencies, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and *if there had been no provision, respecting these subjects, in the treaty*, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. (Emphasis supplied).

Contrary to that principle, the appellants insist the treaties between Japan and Taiwan, South Korea, and China preserved the claims of individuals by failing to mention them (a claim that would be untenable with respect to the Philippines). Japan does not agree, nor does the Department of State, which takes the position that “[t]he plaintiffs’ governments . . . chose to resolve those claims through international agreements with Japan.” Statement of Interest at 31. In order to adjudicate the plaintiffs’ claims, the court would have to resolve their dispute with Japan over the meaning of the treaties between Japan and Taiwan, South Korea, and China,



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which, as the State Department notes in arguing this case is nonjusticiable, would require the court to determine “the effects of those agreements on the rights of their citizens with respect to events occurring outside the United States.” *Id.*

The question whether the war-related claims of foreign nationals were extinguished when the governments of their countries entered into peace treaties with Japan is one that concerns the United States only with respect to her foreign relations, the authority for which is demonstrably committed by our Constitution not to the courts but to the political branches, with “the President [having] the ‘lead role.’” *Garamendi*, 539 U.S. at 423 n.12. And with respect to that question, the history of management by the political branches, *Baker*, 369 U.S. at 211, is clear and consistent: Since the conclusion of World War II, it has been the foreign policy of the United States “to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting the resolution of those claims through political means.” Statement of Interest at 29; *see also* S. Rep. No. 82-2, 82d Cong., 2d Sess. 12 (1952) (“Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan’s economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish”); *Aldrich v. Mitsui & Co. (USA)*, Case No. 87-912-Civ-J-12, Slip Op. at 3 (M.D. Fla. Jan. 20, 1988) (following State Department’s recommendation to dismiss private claim as barred by 1951 Treaty); *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 946-48 (N. D. Cal. 2000) (same).

It is of course true, as the appellants point out, that in general “the courts have the authority to construe treaties and executive agreements,” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986); *see also* *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-36 (11th Cir. 2004). At the same time, the Executive’s interpretation of a treaty is ordinarily entitled to “great weight,” *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).



Here, however, the United States is not a party to the treaties the meaning of which is in dispute, and the Executive does not urge us to adopt a particular interpretation of those treaties. Rather, the Executive has persuasively demonstrated that adjudication by a domestic court not only “would undo” a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan’s “delicate” relations with China and Korea, thereby creating “serious implications for stability in the region.” Statement of Interest at 34-35. Consider: According to the appellants the Republic of Korea does not agree with Japan’s understanding that the treaty between them extinguished the appellants’ claims against Japan. *See* Reply Brief of Appellants at 15 n.14 (quoting Korean Foreign Minister as saying that “it is the government’s position that the [Treaty of 1965] does not have any effect on individual rights to bring claims or lawsuits,” . . . Is it the province of a court in the United States to decide whether Korea’s or Japan’s reading of the treaty between them is correct, when the Executive has determined that choosing between the interests of two foreign states in order to adjudicate a private claim against one of them would adversely affect the foreign relations of the United States? Decidedly not. The Executive’s judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine.

\* \* \* \*

**c. *Alperin v. Vatican Bank***

On June 9, 2005, the Ninth Circuit issued an amended decision dismissing claims arising out of the Holocaust against the Vatican Bank and a Catholic religious order. *Alperin v. Vatican Bank*, 410 F.3d 532 (9<sup>th</sup> Cir. 2005).

The court concluded:

certain of the Holocaust Survivors’ claims—those with respect to lost and looted property (conversion, unjust enrichment, restitution, and an accounting)—are not barred by [the political question] doctrine. In contrast, the

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broad human rights allegations tied to the Vatican Bank's alleged assistance to the war objectives of the [Croatian] Ustasha present nonjusticiable controversies.

The court explained that "by agreement of the parties the district court limited its discussion to the issue of whether the . . . claims should be dismissed under the political question doctrine." As noted by the court, the United States was not involved in the litigation. Most footnotes have been omitted from the excerpts that follow.

\* \* \* \*

A group of twenty-four individuals and four organizations (the "Holocaust Survivors") claim that the Vatican Bank, known by its official title *Istituto per le Opere di Religione*, the Order of Friars Minor, and the Croatian Liberation Movement (*Hrvatski Oslobodilacki Pokret*), profited from the genocidal acts of the Croatian Ustasha political regime (the "Ustasha"), which was supported throughout World War II by Nazi forces. That profit allegedly passed through the Vatican Bank in the form of proceeds from looted assets and slave labor. . . .

\* \* \* \*

A. PROPERTY CLAIMS

\* \* \* \*

. . . [T]he Property Claims ultimately boil down to whether the Vatican Bank is wrongfully holding assets. Deciding this sort of controversy is exactly what courts do. The presence of a foreign defendant with some relationship to a foreign government and claims stemming from World War II atrocities tinge this case with political overtones, but the underlying property issues are not "political questions" that are committed to the political branches.

\* \* \* \*

More than four years have passed since the Vatican sent its protest to the State Department. The Holocaust Survivors represented to the court that the State Department has been apprised of this ap-

peal but has said that its decision not to intervene is not reflective of its view on the merits of this case.

Had the State Department expressed a view, that fact would certainly weigh in evaluating this [issue]. It is unclear, however, how courts should construe executive silence. We are not mind readers. And, thus, we cannot discern whether the State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference. At best, this silence is a neutral factor.

\* \* \* \*

This case will proceed with foreign relations considerations as a backdrop, and the district court should and “can consider the nation's foreign policy interests and international comity concerns in [its] decisions.” *Ungaro-Benages*, 379 F.3d at 1237 . . . Despite these delicate considerations, the district court is fully capable of resolving the Property Claims without expressing a lack of respect for the political branches.

\* \* \* \*

## B. WAR OBJECTIVES CLAIMS

In contrast to the Property Claims, the Holocaust Survivors' allegations that “the actions and conduct of Defendants, in addition to being profitable, actively assisted the war objectives of the Ustasha Regime” strike at the heart of the Ustasha's wartime conduct. The Holocaust Survivors catalog a litany of claimed international law violations. . . .

The claims, which we have denominated as the “War Objectives Claims,” present a nonjusticiable political question.

\* \* \* \*

. . . The United States has acknowledged that “conflicting priorities on the part of the Allies—particularly the need to rebuild a war-torn Europe and assemble a Western coalition against Soviet aggression with the onset of the Cold War—led to an insufficient recovery of looted gold and other assets.” *Id.* at iv. It is not our role to sit in judgment as to whether the perceived Communist threat justified assisting alleged war criminals. Rather, we are

mindful of the Supreme Court's admonition that it is up to the political branches to come to terms with these "delicate [and] complex" foreign policy decisions "for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 92 L. Ed. 568, 68 S. Ct. 431 (1948).

Whether the Holocaust Survivors' claims related to slave labor are justiciable is a more nettlesome question. The exact nature of the slave labor claims against the Vatican Bank is not entirely clear from the Complaint. . . . Unlike cases in which the defendants were the enslaving entities, the slave labor claims against the Vatican Bank are, in effect, derivative claims: The Ustasha profited from slave labor, these profits benefitted the Ustasha treasury, and portions of these tainted funds were transferred to the Vatican Bank. . . .

Determining whether the Vatican Bank was unjustly enriched by profits derived from slave labor would therefore necessitate that we look behind the Vatican Bank and indict the Ustasha regime for its wartime conduct. We are not willing to take this leap. Condemning—for its wartime actions—a foreign government with which the United States was at war would require us to "review[] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutionally commit[ted].'" *Goldwater*, 444 U.S. at 1006 (Brennan, J., dissenting) (quoting *Baker*, 369 U.S. at 217); cf. *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding in case involving the murder of an American by the Nicaraguan Contras that "the broad allegations . . . which comprise the entire military and political opposition in Nicaragua, are non-justiciable").

. . . It is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for using forced labor during World War II. Any such policy condemning the Ustasha regime must first emanate from the political branches.

\* \* \* \*

## 2. Payments to Victims of the Nazi Era

### a. Settlement of claims related to the Hungarian Gold Train

On September 30, 2005, the U.S. District Court for the Southern District of Florida issued a final order and judgment approving a \$25.5 million settlement in a class action brought by individuals claiming interest in property from what came to be known as the Hungarian Gold Train. *Rosner v. United States*, Final Order and Judgment, Case No., 01-1859-CIV-SEITZ (Sept. 30, 2005). Key documents in the *Rosner* litigation are available on websites maintained by class counsel, e.g., [www.hungariangoldtrain.org](http://www.hungariangoldtrain.org) and [www.hagens-berman.com/frontend?command=Law-suit@task=viewLawsuitDetail@iLawsuitId=85](http://www.hagens-berman.com/frontend?command=Law-suit@task=viewLawsuitDetail@iLawsuitId=85). See also *Digest* 2004 at 445-49.

The court order provided a brief factual background of the case and summarized the terms of the settlement agreement between the United States and the plaintiffs as excerpted below (footnotes deleted). The full text of the order is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Beginning in April 1944, valuable personal property belonging to the Jewish population of Hungary was confiscated by the Hungarian government. In late 1944, a portion of the confiscated property was loaded on a train and taken to Austria where it ultimately fell into the hands of the U.S. Army on May 11, 1945. Before arriving in Austria, however, a significant portion of the valuable property from the train was off-loaded to trucks and taken to French-occupied Austria. This portion of the Gold Train Property never came into U.S. custody. The property on the train that did come under U.S. custody was placed in a warehouse under U.S. Army control in Salzburg, Austria, where some of it was “requisitioned” by senior U.S. Army officers and stolen by U.S. Army enlisted personnel and others. Subsequently, the U.S. Government claimed that the property could not be identified as to ownership or national origin, and thereafter turned the bulk of the remaining property over to the

Inter-Governmental Committee on Refugees which auctioned some of the property in New York City in 1948-1949. Despite the efforts of the Hungarian Jewish community to secure the return of the Gold Train Property, none of the property was ever returned by the United States to its rightful owners. On October 7, 1999, the Presidential Advisory Commission on Holocaust Assets in the United States published its Progress Report On: The Mystery of the Hungarian "Gold Train,"\* in which the United States, for the first time, publicly revealed its role in the receipt, handling, and disposition of the Gold Train Property.

\* \* \* \*

#### A. The Settlement Fund

The Settlement creates a Settlement Fund of \$25.5 million which shall be deposited by Defendant into an interest bearing escrow account within 30 days of Final Approval of the Settlement, including resolution of all appeals of the Final Order and Judgment. Of this amount, approximately \$21 million will be disbursed as described in the Plan of Allocation, under the Court's supervision and control. The Settlement does not call for individual distributions to all Class Members as compensation. Rather, the funds will be used for the direct provision of social services and humanitarian relief to eligible Victims of Nazi Persecution who are in need as defined in the Settlement Agreement. The Special Fund will be allocated to countries pro rata based on Professor Randolph Braham's estimate of the numbers of Hungarian Holocaust survivors residing in each particular country today.

#### B. Non-Monetary Benefits

In addition to the monetary distributions through humanitarian and welfare agencies, the Settlement contains substantial non-monetary relief which will benefit all Class Members. For example, \$500,000 from the Settlement Fund shall be designated for an entity chosen by a panel of experts to collect papers and materials re-

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\* Editor's note: The progress report is available on the website of the Presidential Advisory Commission on Holocaust Assets at [www.pcha.gov/goldtrainfinaltoconvert.html](http://www.pcha.gov/goldtrainfinaltoconvert.html).

lated to the receipt, handling, and disposition of the Gold Train Property. Moreover, the Settlement also calls for an acknowledgment from the United States relating to its role in the handling of the Gold Train Property.

\* \* \* \*

The U.S. Department of Justice issued a statement on the same date, set forth in full below.

The Jewish communities in lands controlled by the wartime Hungarian government suffered unspeakable crimes during the Holocaust at the hands of the Nazis and their Hungarian collaborators. The United States expresses its sympathy and solidarity with these victims and hopes that the settlement approved by the District Court will provide meaningful assistance to those survivors.

More than 175,000 Americans lost their lives combating the scourge of Nazism, and countless more were injured. Under very difficult conditions and at enormous personal sacrifice, American and allied troops defeated a determined enemy, liberated concentration camps, and fed, clothed and provided medical care to millions of starving and sick refugees, Jewish and non-Jewish alike. After the war, the United States Government and its citizens initiated unprecedented programs to aid, repatriate, and resettle Jewish and non-Jewish refugees.

In 1945, in the midst of the chaos of the immediate postwar period, U.S. forces captured what is now known as the Hungarian Gold Train from the Hungarian pro-Nazis. That train contained some of the personal property plundered from the Jewish communities of so-called "Greater Hungary," an area that included territories that had been seized from neighboring countries. Some non-Jewish property was on the train as well. The train, when captured by U.S. forces, was found to contain, among other things, boxes of jewelry, cutlery, thousands of wedding rings, and other personal property commingled without regard to the identity of their owners.

Many of the Jews from whom this property had been stolen were either killed or displaced in the war, and the United States Government at the time found that it had no practical way to iden-

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tify the property or return it to the individuals from whom it had been stolen, as meaningful traces of individual ownership had been largely obliterated by the Hungarian pro-Nazis. The United States likewise concluded that it could not identify even the national origin of individual items, since the train contained property plundered from Jewish residents of territories that belonged to a number of different countries. Further, transferring the train's contents to the postwar Hungarian government would, in effect, have recognized as legitimate Axis Hungary's annexation of portions of neighboring countries. There was also good reason to doubt that the Hungarian government would return any property to the surviving Jews of Hungary (many of whom were, in any event, no longer in Hungary and would never return there). Indeed, shortly after World War II, the French returned to Hungary certain property that was associated with the Gold Train prior to its capture by the United States, but the post-war communist Hungarian government denied that the property was Jewish in origin and virtually none of the property was returned to its Jewish owners.

The U.S. Government, recognizing the tragic origin of the Gold Train property, sought to use it to help surviving victims. In 1948, after consulting with leading Jewish organizations, and with their approval, the United States transferred the property to the International Refugee Organization ("IRO"). The IRO sold the property at auction and the proceeds were applied for the benefit of victims. Ninety percent of the proceeds were passed to preeminent Jewish relief organizations—including the Jewish Agency for Palestine and the American Jewish Joint Distribution Committee—to be used for the rehabilitation and resettlement of Jewish refugees. The remaining ten percent assisted non-Jewish refugees. None of the proceeds was kept by the United States.

The United States Government takes seriously any allegation that its conduct may have contributed in any way to the suffering or anguish of Hungarian Holocaust survivors, and the United States has thoroughly examined its conduct with respect to the Hungarian Gold Train property. It has also consulted with eminent scholars in the field. On the basis of its examination and consultation, the United States has concluded that, although the conduct of its personnel was appropriate in most respects, it was contrary to



U.S. policy and the standards expected of its soldiers in two important areas.

First, some military personnel failed to return Gold Train property that had been requisitioned by the military during the initial post-war period. The requisitioned property included, among other things, typewriters, rugs, cutlery, and linens that were used by American military personnel in offices and official residences in post-war Europe. Although records survive reflecting the return of certain requisitioned Gold Train property to the U.S.-run warehouse from which it had been removed, the United States acknowledges that, in contravention of law and United States policy, some of its military personnel did not return that property upon their departure from Europe, but instead that property was either abandoned, retained or damaged beyond repair.

Second, some property was stolen from the warehouse in which the Gold Train property (as well as other property) was stored before the auction, and at least some of the thefts were perpetrated by members of the United States armed forces. Certain of the wrongdoers were apprehended, prosecuted and punished, but only a portion of the stolen property was recovered.

The United States regrets the improper conduct of certain of its military personnel and seeks in this settlement to provide meaningful assistance to those Hungarian Holocaust survivors still living who qualify as financially needy.

***b. Austrian payments***

As noted by the court in 1.a. *supra*, *Whiteman* was the “one remaining litigation obstacle to the implementation of the [Austrian General Settlement Fund] Agreement.” On December 9, 2005, the Department of State issued a press statement welcoming developments

clearing the way for approximately 19,000 Holocaust survivors and heirs to receive a measure of justice under the terms of a 2001 U.S.-Austria agreement. Many of the beneficiaries of this agreement live in the United States. During his Washington visit this week, Austrian Chancellor Wolfgang Schuessel expressed the hope that payments

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from the \$210 Million Austrian General Settlement Fund can begin soon.

The full text of the press statement is available at [www.state.gov/r/pa/prs/ps/2005/57864.htm](http://www.state.gov/r/pa/prs/ps/2005/57864.htm). See also *Digest* 2000 at 485-89 and *Digest* 2001 at 394-95.

### **c. German payments**

Section 704 of the Foreign Relations Authorization Act, FY 2003, Pub. L. No. 107-228 (2002), requires the Secretary of State to report to the appropriate Congressional committees every 180 days on the status of the implementation of the Agreement between the Government of the United States and the Government of the Federal Republic of Germany concerning the Foundation “Remembrance, Responsibility, and the Future,” signed in Berlin on July 17, 2000, and, to the extent possible, on payments to and from the Foundation and on certain aspects of the functioning of the International Commission on Holocaust Era Insurance Claims (“ICHEIC”). The Secretary filed the sixth report pursuant to that statutory requirement in September 2005, available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

As to payments from the Foundation, the report stated:

As of June 2005, approximately \$5.1 billion (4.2 billion Euro or 8.2 billion DM) had been paid to approximately 1,627,000 surviving slave and forced laborers. This represents 97 percent of the funds (8.1 billion DM plus an additional amount from interest earnings) available from the Foundation’s capital for slave and forced labor payments. The remaining funds will continue to be paid out over the next 6 to 12 months. . . .

The report also provided a breakdown of payments by partner organizations.

As to ICHEIC, the report explained that “[t]he [German] law establishing the Foundation provides funds to ICHEIC for the payment of claims arising from unpaid insurance policies issued by German insurance companies, as well as for the

associated costs, and also a contribution to the ICHEIC humanitarian fund.” Based on information available on ICHEIC’s website at [www.icheic.org](http://www.icheic.org), the report stated that as of September 2005, the ICHEIC claim process was nearing completion:

ICHEIC has received approximately 88,600 claims or inquiries, and has processed 34,500 claims cases, resulting in a total of \$147 million in payment offers. Specifically, ICHEIC and cooperating companies have made 7,836 payment offers totaling \$120.61 million. An additional 26,683 individuals received payments of \$1,000 each through ICHEIC’s humanitarian claims process. To date, some 3,100 claims were transferred to other relevant claims organizations and 8,645 claims have been denied.

ICHEIC indicated at the May 25 meeting of its officials and Commissioners that its objectives are “the completion of decision-making on all claims by 31 December 2005 and completion of all appeals decisions by mid-2006.”

The Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation “Remembrance, Responsibility and the Future” is reprinted in 39 I.L.M. 1298 (2000); *see also Digest 2000* at 446-50. The Agreement Concerning Holocaust Era Insurance Claims, entered into among the Foundation, ICHEIC and the German Insurance Association is available at [www.icheic.org/pdf/agreement-GFA.pdf](http://www.icheic.org/pdf/agreement-GFA.pdf); *see also Digest 2002* at 430-34. Discussions of implementation of the agreements appear in this chapter in *Digests 2000-2004*.

### **3. Agent Orange Litigation**

On March 10, 2005, the U.S. District Court for the Eastern District of New York dismissed claims related to the use of herbicides during the Vietnam War. *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), as amended Aug. 26, Aug. 23, and Mar. 28, 2005. As described by the court,

[t]his case involves claims by Vietnamese nationals and an organization, The Vietnamese Association for Victims

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of Agent Orange/Dioxin ("VAVAO"), for harms allegedly done to them and their land by the United States' use of Agent Orange and other herbicides during the Vietnam War from 1965 to 1971 and the South Vietnamese government's subsequent use of such herbicides until 1975. They allege that the manufacturer-defendants are responsible under domestic tort law and under international law.

The court explained that "[i]t is alleged that defendants' actions have violated, and plaintiffs' causes of action arise from, . . . laws, treaties, conventions and resolutions, which constitute specific examples of the applicable law of nations or customary international law." Plaintiffs alleged violations of the Alien Tort Statute as well as specific violations of international conventional and customary law. In its opinion, after a lengthy analysis of the sources of domestic and international law invoked by the plaintiffs, the court dismissed all claims, concluding that "[t]here is no basis for any of the claims of plaintiffs under the domestic law of any nation or state or under any form of international law."

At the invitation of the court, the United States had filed a Statement of Interest in the case on January 12, 2005, arguing that (1) the claims raise non-justiciable political questions, (2) plaintiffs lack a cause of action to assert international law claims, (3) the President's decision to use herbicides during the Vietnam War constitutes a "controlling executive act" foreclosing plaintiffs' customary international law claim, and (4) the court should defer to the executive's determination that neither the treaties cited by plaintiffs nor customary international law prohibited the use of chemical herbicides in Vietnam, and the federal common law government contractor defense should be deemed applicable to all of plaintiffs' international law claims.

The U.S. statement summarized its arguments as set forth below. The full text is available at [www.state.gov/s/l/8183.htm](http://www.state.gov/s/l/8183.htm).

\* \* \* \*

Nearly thirty years after the withdrawal of the last American soldier from Vietnam, some twenty-five years after the first domestic action related to the United States' use of Agent Orange and other herbicides in Vietnam, and twenty years after that first round of litigation was settled, plaintiffs seek to achieve via litigation what their Government has not achieved via diplomacy—compensation for the alleged harms caused by the use of chemical herbicides in Vietnam. In addition to asserting a variety of common law tort claims, plaintiffs assert that the defendant chemical companies conspired with the United States to commit war crimes, genocide, crimes against humanity, and torture. The implications of plaintiffs' claims are astounding, as they would (if accepted) open the courthouse doors of the American legal system to former foreign enemy nationals and soldiers claiming to have been harmed by the United States Armed Forces' use of materials supplied by American manufacturers during times of war. At bottom, this litigation seeks to challenge the means by which the United States prosecuted the Vietnam war, and ineluctably draws into issue the President's constitutional Commander in Chief authorities and invites impermissible second-guessing of the Executive's war-making decisions.

Plaintiffs seek such a breathtaking expansion of federal jurisdiction based on actions that were, at the time, the subject of great debate with respect to their status under international law. Indeed, the Executive branch considered—and repeatedly rejected—the contention that the use of chemical herbicides in Vietnam constituted a violation of the laws of war. Based in part on this determination, President Kennedy himself authorized the use of herbicides, and the United States requisitioned the chemicals at issue from the defendant manufacturers. In light of this background, plaintiffs' international law claims should be dismissed for a variety of reasons.

First, adjudication of plaintiffs' international law claims would require this Court to pass upon the validity of the President's decisions regarding combat tactics and weaponry, made as Commander in Chief of the United States during a time of active combat. Such judicial review would impermissibly entrench upon the Executive's Commander in Chief authority, and run afoul of basic principles of separation of powers and the political question doctrine.

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Second, plaintiffs lack a cause of action to assert the international law claims set forth in the Amended Complaint. None of the statutes or treaties relied upon by plaintiffs provide them with a cause of action. Moreover, the Amended Complaint fails to state a cognizable claim for a violation of the law of nations under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004). Because the use of herbicides in war was not unlawful—let alone universally and specifically proscribed—the Court should not recognize a federal common law cause of action seeking damages for such conduct.\*

Third, because the Executive branch considered the very questions of customary international law now before the Court, expressly determined that the conduct at issue did not violate such law, and the President himself acted based upon that determination pursuant to his constitutional authority as Commander in Chief, the President’s actions displace any contrary international legal norm as a rule of decision in this case. Because these controlling executive acts preempt the application of customary international law in the domestic legal system, the Court should reject any claims based upon such law.

Fourth, were the Court to address plaintiffs’ international law claims, it should give deference to the Executive’s interpretation of the relevant treaties and customary international law. The Executive branch has significant expertise in the formulation and interpretation of both treaties and customary international law, which this Court should accord the substantial deference it is traditionally afforded. That interpretation has consistently been that the United States’ use of chemical herbicides in Vietnam did not violate any applicable rules of international law.

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\* Editor’s note: This paragraph, together with the introductory paragraph outlining the practical consequences of allowing plaintiffs’ claims, summarizes most issues in Section II.B. of the Argument. In addition, subsection 5 of that section addressed plaintiffs’ aiding and abetting claims, arguing that “[t]he creation of civil aiding and abetting liability is a legislative act that the courts should not undertake without a conclusion that Congress so intended, and there is no indication in either the language or history of the ATS that Congress intended such a vast expansion of suits in this sensitive foreign policy area.”

Finally, even if the Court were to determine that plaintiffs have stated a cognizable claim for a violation of international law, the government contractor defense should be held applicable to those claims. All of the rationales set forth by the Supreme Court for the adoption of the defense as a matter of federal common law apply to the case at bar, and international legal principles do not foreclose its application to claims allegedly founded upon customary international law.

For all of these reasons, the Court should dismiss plaintiffs' international law claims.

\* \* \* \*

Each of these points was developed further in the Statement of Interest. Excerpts below from Section III of the Argument address customary international law and the relevant "controlling executive act."

\* \* \* \*

Separate and apart from the absence of any cause of action to assert the international law claims in the Amended Complaint, those claims suffer from another fatal defect—that the President's actions displaced any customary international law norm as the rule of decision in this case. As the above discussion makes clear, the Executive Branch—speaking for the United States as a whole—consistently has taken the position that neither the Geneva Protocol, nor any other rule of international law, prohibits the use of chemical herbicides in war, and that neither the 1907 Hague Convention nor any other rule of international law prohibits the destruction of enemy crops during war. Moreover, the President, acting in light of this long-standing and consistent position, and in his capacity as Commander in Chief of the Armed Forces, made the decision to use chemical herbicides in Vietnam for both defoliation and enemy crop-destruction purposes. Under long-standing Supreme Court precedent, such decisive Presidential action displaces the application of customary international law as a rule of decision in federal courts, and thus dooms plaintiffs' claims based on such law.

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The Supreme Court has long recognized, and recently reaffirmed, that customary international law is only incorporated into the law of the United States absent a “controlling executive or legislative act.” *The Paquete Habana*, 175 U.S. 677, 700 (1900). See *Sosa*, 124 S. Ct. at 2765 (noting that Congress can “shut the door” to the law of nations “at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such”). See also *The Schooner Exchange*, 11 U.S. 116, 145 (812). That is, the Supreme Court has recognized that in the United States customary international law is ultimately subordinate to municipal law, and, in the realm of foreign relations, both the Congress and the President himself can, when acting within their respective constitutional authority, displace the application of customary international law in the domestic legal system. At its simplest, the principle set forth in *The Paquete Habana*’s reference to “controlling executive act[s]” further reinforce this principle. In *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), the Eleventh Circuit held that a decision by the Attorney General to incarcerate the alien plaintiffs indefinitely, pending efforts to deport them, constituted a controlling executive act under *The Paquete Habana* regardless of any international legal principles barring indefinite detentions. 788 F.2d at 1454-55. In the words of the *Garcia-Mir* court, “the executive acts here evident constitute a sufficient basis for affirming the trial court’s finding that international law does not control.” *Id.* at 1455. Similarly, in *Gisbert v. U.S. Att’y General*, 988 F.2d 1437, 1447 (5th Cir. 1993), the Fifth Circuit held that the Attorney General’s decision to detain the appellants indefinitely pending their deportation constituted a controlling executive action for similar purposes. *Id.* at 1447-48. That is, where a high-level Executive Branch official acts pursuant to constitutional authority, the international law principle at issue is deemed displaced and inapplicable domestically to prohibit the conduct in question.

This is particularly true where the “controlling executive act” is a decision made by the President in his capacity “both as Commander-in-chief and as the Nation’s organ for foreign affairs,” *Chicago & Southern Air Lines*, 333 U.S. at 111. Indeed, even commentators skeptical of the scope of the exception for “controlling ex-



ecutive acts” recognize that acts by the President in his capacity as “‘sole organ’ in foreign affairs, and as commander-in-chief . . . may have an effect on the law of the United States; they may make law and have the effect as law in the United States.” Louis Henkin, *Agora; May the President Violate Customary International Law?*, 80 Am J. Int’l L. 930, 934 (1986). *See also id.* at 935 (“the question is whether [the President] has constitutional authority to do the act that terminated the treaty or superseded the customary principle. The elimination of the treaty or of the principle of customary law from the law of the United States follows.”).

\* \* \* \*

### **Cross References**

*Cases addressed under Alien Tort Statute, Chapter 6.H.5.a.*

*Claims addressed under Foreign Sovereign Immunities Act, head of state, diplomatic or consular immunities, or act of state, Chapter 10.*

*Dispute resolution under NAFTA and WTO, Chapter 11.C. and D.3.*



## CHAPTER 9

### Diplomatic Relations, Succession and Continuity of States

Discussions concerning the future of Montenegro were ongoing during 2005. As noted in Chapter 17.A.5., Montenegrin officials indicated their desire to hold a referendum in 2006 on independence from Serbia-Montenegro. The United States did not take a position as to a specific outcome but stated its intention to support whatever solution the two republics agree on through democratic means.

Libya and the United States continued to maintain diplomatic liaison offices in each other's capitals, opened in 2004, pending a decision to upgrade to full embassies based on further developments in the relationship between the two countries.



## CHAPTER 10

### Immunities and Related Issues

#### A. SOVEREIGN IMMUNITY

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602–1611, provides that, subject to applicable international agreements to which the United States was a party at the time of enactment in 1976, a foreign state is immune from the jurisdiction of courts in the United States unless one of the specified exemptions in the statute applies. A foreign state is defined to include its agencies and instrumentalities. The FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). For a number of years before enactment of the FSIA, courts abided by “suggestions of immunity” from the State Department. When no suggestion was filed, however, the courts made the determination.

In the FSIA Congress codified the “restrictive” theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those that are private or commercial in character. The United States had previously adopted the restrictive theory in the so-called “Tate Letter” of 1952, reproduced at 26 Dep’t State Bull. 678 at 984–85 (1952). See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–15 (1976).

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver or agreement to arbitrate. Over time, amendments to the FSIA incorporated ad-

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ditional exceptions. In 1996 Congress enacted the terrorism exception. The various statutory exceptions, set forth at 28 U.S.C. §§ 1605(a)(1)-(7), have been subject to significant judicial interpretation. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. Government is not a party and participates, if at all, as *amicus curiae*.

The following items represent a selection of the relevant decisional material during 2005.

### 1. Scope of Application

#### a. Default judgments

In *Owens v. Sudan*, 374 F. Supp. 2d 1 (D.C. Cir. 2005), the U.S. District Court for the District of Columbia addressed the issue of default judgments in cases against foreign sovereigns, as excerpted below. The court denied defendants' motion to dismiss; *see* 4.b.(3) below.

\* \* \* \*

. . . [T]he D.C. Circuit has stressed that an entry of default should not be applied inflexibly to deny a willing foreign state the opportunity to offer a full defense to an FSIA action:

Foreign sovereigns unfamiliar with the United States judicial system may fail to comprehend accurately what the FSIA means and how it operates. Intolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage . . . foreign sovereigns generally to resolve disputes within the United States' legal framework. . . When a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal arguments.

*Practical Concepts, Inc. v. Republic of Bolivia*, 258 U.S. App. D.C. 354, 811 F.2d 1543, 1552 & n. 19 (D.C. Cir. 1987) (quotation omitted).

[Also] section 1608(e) of the FSIA provides that a court cannot enter judgment by default against a foreign state “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). This provision requires the Court to satisfy itself that there exists an adequate legal and factual basis for plaintiffs’ claims. . . . Even if it were true that the Sudan defendants committed procedural error in some respect upon appearing in the case, the Court is not inclined to prevent the Sudan defendants from making arguments in their own defense that the Court would have a statutory obligation to fully consider even in their absence. *See Int’l Road Fed’n v. Embassy of the Dem. Republic of the Congo*, 131 F. Supp. 2d 248, 250 (D.D.C. 2001) (“Congress intended § 1608(e) to provide foreign states protection from unfounded default judgments rendered solely upon a procedural default.”).

\* \* \* \*

**b. Definition of foreign state**

**(1) Palestinian Authority**

On March 31, 2005, the U.S. Court of Appeals for the First Circuit affirmed a district court ruling rejecting a claim of sovereign immunity by the Palestinian Authority (“PA”) and Palestine Liberation Organization (“PLO”). *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005).

The court concluded that because the Palestinian Authority was not a state, it was not entitled to sovereign immunity under the FSIA. The court also noted that the Anti-Terrorism Act (“ATA”), 18 U.S.C. §§ 2331-2338, similarly provides “that no civil action thereunder may be maintained against ‘a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.’” The court found that “neither the FSIA nor the ATA define the term

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‘foreign state’ as it relates to a sovereign power.” The court continued:

There is no controlling precedent in this circuit as to the essential attributes of statehood in this context. The parties, however, find common ground in their shared conviction that the definition should be derived by application of the standard set forth in the Restatement (Third) of Foreign Relations. This standard deems a state to be “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” Restatement (Third) of Foreign Relations § 201 (1987). Under the Restatement standard, political recognition—typically thought of as “a formal acknowledgment by a nation that another entity possesses the qualifications for nationhood,” . . . is not a prerequisite to a finding of statehood. See Restatement (Third) of Foreign Relations § 202 cmt. B (explaining that “an entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states”).

While noting that the Restatement standard “is not inevitably correct,” the court concluded that even if the test of recognition were added, the conclusion would be the same. *See* 6.a. below concerning efforts to attach properties of the Palestinian Authority in satisfaction of judgments in this case.

### (2) *Consular facility*

*See Copelco Capital v. Brazilian Consulate General*, discussed in 6.c. below.

### (3) *Individual government official acting in official capacity*

In *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), the Seventh Circuit held that the FSIA was inapplicable to a claim against General Abdulsalami Abubakar, who “was a member of [a military junta that ruled Nigeria from November 1993 un-



til May 1999] and was Nigeria's head of state for the last year of the junta's reign." The lower court had found that Abubakar was entitled to head of state immunity for the relevant year, a holding that was not appealed to the Seventh Circuit; the question on appeal was immunity for acts taken as a member of the ruling junta before he was head of state. The court noted that the FSIA definition of "agency or instrumentality of a foreign state" includes "any entity—(1) which is a separate legal person, corporate or otherwise. . . ." The court stated:

. . . Given that the phrase 'corporate or otherwise' follows on the heels of 'separate legal person,' we are convinced that the latter phrase refers to a legal fiction—a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."

It is true, however, that this issue is a long way from being settled. The FSIA has been applied to individuals, but in those cases one thing is clear; the individual must have been acting in his official capacity. . . .

\* \* \* \*

In our case, we conclude, based on the language of the statute, that the FSIA does not apply to General Abubakar. . . .

## **2. Retroactive Application of the FSIA**

Following the decision by the U.S. Supreme Court finding the FSIA applied retroactively to claims arising out of World War II property confiscations, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), see *Digest 2004* at 463-72, on May 18, 2005, the parties agreed to submit their disagreement to binding arbitration. The arbitration was ongoing at the end of 2005.

Several cases that were vacated and remanded by the Supreme Court following the decision in *Altmann* were found to present nonjusticiable political questions and were dis-

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missed in 2005. See *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57 (2d Cir. 2005) and *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), discussed in Chapter 8.B.1.a. and b.

### 3. Deference to U.S. foreign policy concerns

See Chapter 8.B.1.

### 4. Exceptions to Immunity

#### a. Commercial activity

See *Copelco Capital v. Brazilian Consulate General*, discussed in 6.c. below.

#### b. Certain acts of terrorism: Failure to state a cause of action

In 1996 Congress amended the FSIA to provide a limited exception to sovereign immunity in certain circumstances in U.S. courts for claims resulting from acts of state-sponsored terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA” or “Antiterrorism Act”), Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. § 1605(a)(7), created an exception to foreign sovereign immunity in claims “for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such act (as defined in § 2339A of title 18) if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” The exception was made available only for states “designated as state sponsors of terrorism under § 6(j) of the Export Administration Act of 1979 (50 U.S.C. app. § 2405(j)) or § 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371) at the time the act occurred, unless later so designated as a result of such act.” At the time of enactment seven states were so designated: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. Iraq and Libya have since been removed from the list.

Subsequently, Congress adopted a provision creating a private right of action against officials, employees, or agents of a designated foreign state:

(a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) . . . for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

“Civil Liability for Acts of State Sponsored Terrorism,” § 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-172 (1996), *reprinted at* 28 U.S.C.A. § 1605 note (West Supp. 1997). The provision is referred to as the “Flatow Amendment” (although in fact it amends no law) or “Flatow Act” in recognition of the family of Alisa Flatow, an American woman who died as the result of a terrorist bombing in Gaza.

(1) *Acree v. Republic of Iraq*

On April 25, 2005, the U.S. Supreme Court denied a petition for certiorari to the District of Columbia Circuit in *Acree v. Republic of Iraq*, 544 U.S. 1010 (2005). In that case, brought by former U.S. servicemen who had been held as prisoners of war during the Gulf War, the D.C. Circuit vacated a default judgment for \$969 million against Iraq. *See Digest 2004 at* 489-93, 507-08. The court of appeals dismissed the case for failure to state a cause of action, finding that neither § 1605(a)(7), nor the Flatow Act, nor the two together create a cause of action against a foreign state. In its brief opposing the grant of certiorari, the United States argued that review by the Supreme Court of this issue was not warranted because “[t]hat holding is correct and does not conflict with any deci-

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sion of this Court or of another court of appeals.” The United States also argued that “[t]his case would not, in any event, be a suitable vehicle for considering petitioners’ substantive arguments because, contrary to the conclusion of the court of appeals majority, the courts were deprived of jurisdiction over petitioners’ claims when, prior to entry of judgment and pursuant to authority conferred on him by Section 1503 of the EWSAA, the President rendered 28 U.S.C. § 1605(a)(7) inapplicable to Iraq.” The Brief for the United States in Opposition is available at [www.usdoj.gov/osg/briefs/2004/oresponses/2004-0820.resp.html](http://www.usdoj.gov/osg/briefs/2004/oresponses/2004-0820.resp.html).

(2) *Dammarell v. Islamic Republic of Iran*

In *Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343 (D.D.C. 2005), over eighty plaintiffs filed suit against Iran and its Ministry of Intelligence and Security (“MOIS”) seeking damages for their material support of Hizbollah in the 1983 bombing of the U.S. embassy in Beirut, Lebanon.

In its March 29, 2005, opinion, the U.S. District Court for the District of Columbia first found that it had jurisdiction over Iran and the MOIS under the terrorist exception in § 1605 (a)(7). Excerpts follow from its extensive review of law available to provide a cause of action for a claim brought under that section concluding that valid causes of action existed under state law. (Footnotes and most internal citations omitted.)

Subsequently, the plaintiffs filed an amended complaint and a supplemental brief required by the court to address the proper choice-of-law determination for each individual or estate. On December 14, 2005, the district court issued a default judgment awarding damages to twenty-nine of the plaintiffs under state law causes of action totaling \$126,061,657. *Dammarell v. Iran*, 2005 U.S. Dist. LEXIS 32618 (D.D.C. 2005).

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On April 18, 1983, a massive car bomb exploded at the United States Embassy in Beirut, Lebanon, killing sixty-three people and

injuring over one hundred others. Among those killed in the blast were seventeen United States citizens. The explosion was the first large-scale attack against a United States embassy anywhere in the world, and marked the onset of two decades of terrorist attacks on the United States and its citizens overseas and at home. In this civil action, more than eighty plaintiffs—citizens of the United States who were victims of the bombings, and their families and estates—seek damages from the Islamic Republic of Iran (“Iran”) and its Ministry of Intelligence and Security (“MOIS”) for their material support of the terrorist organization that carried out this devastating attack.

\* \* \* \*

## II. Liability

Having concluded that defendants are not immune from suit, the Court turns to a discussion of the causes of action that are permitted against a foreign state for its sponsorship of terrorism. Section 1605(a)(7) only removes the immunity of a foreign state; it does not itself describe a cause of action against the foreign state. . . . Therefore, a plaintiff must look elsewhere for a cause of action, and in its earlier opinion, the Court concluded that plaintiffs state a viable cause of action against Iran and the MOIS under the Flatow Amendment to the FSIA. The Court noted that “even if the Flatow Amendment were held not to create a federal statutory cause of action against state sponsors of terrorism, plaintiffs nevertheless would have valid claims against Iran and the MOIS under state and/or federal common law.” *Dammarell*, 281 F. Supp. 2d at 193.

Two recent D.C. Circuit decisions require the Court to re-examine these holdings. In the first case, the court held that “neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government.” *Cicippio-Puleo*, 353 F.3d at 1033. In the second case, the court explained that “generic common law cannot be the source of a federal cause of action” against a foreign state. *Acree*, 370 F.3d at 58. These decisions expressly leave open the question whether a cause of action against a foreign nation might exist under “some other source of law, including state law,” *Cicippio-Puleo*,

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353 F.3d at 1036, and can even be read to leave open the possibility that, although the Flatow Amendment does not give rise to a cause of action of its own force, it might do so through other statutes, *id.* at 1033.

\* \* \* \*

### C. Causes of Action Available Under Section 1605(a)(7)

\* \* \* \*

The overarching principle that guides this Court's analysis is that the causes of action that may be brought against a foreign state should not depend on whether the foreign state lost its sovereign immunity under section 1605(a)(7) instead of one of the other provisions in section 1605.

As a consequence, a plaintiff should be able to bring a cause of action under state common or statutory law, federal statutes (where Congress has not indicated otherwise), and even—in rare instances—the law of a foreign country in a section 1605(a)(7) case, as long as the plaintiff would be able to bring such a claim against a private individual in similar circumstances. The general approach should be the one courts have employed for decades in cases under the other exceptions in section 1605. This is not to say that a court should be insensitive to the unique concerns raised by an action alleging that a foreign country is a sponsor of terrorism. These concerns simply cannot overcome the plain text of the statute, which directs the courts to allow plaintiffs to bring any claims they would be able to bring if the defendant were a private individual charged with the same acts of terror. . . .

\* \* \* \*

The Flatow Amendment . . . guarantee[d] that a plaintiff will have available certain kinds of damages in claims against an official, employee, or agent of a foreign state—such as solatium and punitives—that might be unavailable or limited under the law of the states. . . .

. . . [L]iability for foreign nations under state law through section 1606 is not incompatible with the expansive damages made

available in claims against foreign officials pursuant to the Flatow Amendment.

#### D. Plaintiffs' Causes of Actions

\* \* \* \*

##### 1. State law

\* \* \* \*

In the absence of a contractual choice of law by the parties, the District of Columbia employs a “constructive blending” of the “governmental interests” analysis and the “most significant relationship” test. . . .

\* \* \* \*

. . . Given the strong and recognized interest of the domicile state in ensuring that its citizens are compensated for harm, and the intrinsic interest of the *lex loci* in deterring attacks within its jurisdiction, the law of the forum state must give way to [other] options under the choice of law rule of the District of Columbia.

That leaves the law of the domicile of the plaintiff and the law of Lebanon as possibilities. The law of a foreign country has provided the cause of action in some cases arising out of mass disasters that occurred on foreign soil. . . . Nonetheless, the Court believes that result would be inappropriate here, for two reasons. First, the cases adopting the law of the foreign state generally do so through the application of a “most significant relationship” test or a modified law of the place of the tort analysis instead of the “governmental interests” approach that governs in the first instance in the District of Columbia. Those courts using a governmental interests analysis have been more inclined to look to the law of the domicile of the plaintiff to vindicate the jurisdiction’s strong and often paramount interest in guaranteeing redress to its citizens. . . .

Second, the particular characteristics of this case heighten the interests of a domestic forum and diminish the interest of the foreign state. The injuries in this case are the result of a state-sponsored terrorist attack on a United States embassy and diplomatic personnel. The United States has a unique interest in its domestic law, rather

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than the law of a foreign nation, determining damages in a suit involving such an attack. *See Restatement (Third) of Foreign Relations Law* § 402(3) (1987) (recognizing that the United States has an interest in projecting its laws overseas for “certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests”). Although the Court concludes later in this opinion that these considerations do not justify the use of federal common law, they do elevate the interests of the United States to nearly its highest point. The constructive blending analysis of the District of Columbia is a fact-specific inquiry, *Mims*, 635 A.2d at 325 n.12, and this Court does not hold that there could never be a situation where the law of a foreign state might provide the rule of decision in a section 1605(a)(7) case. In the circumstances of this case, however, domestic law, and not the law of Lebanon, should control.

\* \* \* \*

. . . . [M]any of the survivors and decedents also were living overseas in Beirut at the time the attack occurred. The situations of these individuals varied, although most were working at the embassy at the time at the direction of the State Department or the United States military, had been posted in other countries previously, and would return to the United States only intermittently. Pl. Mot. at 91; *Dammarell*, 281 F. Supp. 2d at 113-14, 121-24, 133. There is no clear rule to apply to these plaintiffs, although two principles lead the Court to conclude that the governing law should be that of their last state of domicile. First, the Restatement of Conflict of Laws suggests that a soldier or sailor who is “ordered to a station” does not usually become a resident of the foreign country if he “intends, upon the termination of his service, to move to some other place.” *Restatement (Second) of Conflict of Laws* § 17 cmt. d (1971); see also 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3617, at 567 (2d ed. 1984 & Supp. 2003). Second, in the context of determining domicile for purposes of diversity jurisdiction, military and government officials who have protracted stays away from their place of domicile in the United States generally “retain their domicile in the state wherein they formerly resided.” *Wright et al.*, *supra*, § 3620, at 573; see *Agee v. Bush*, No. 95-1909, 1996 WL 914110, at \*4 (D.D.C.). Although



the analogy to these principles is not exact, they do suggest that an individual stationed overseas on government business should be regarded as retaining his or her previous state of domicile in the United States. Although this rule may not capture the circumstance of every one of the plaintiffs living overseas, it will be the general rule the Court will follow proceeding forward.

\* \* \* \*

## 2. Federal common law

. . . The developments in the law during the past several years, and a careful consideration of the entire area of jurisprudence, now compel the Court to find that federal common law should not serve as a rule of decision in the run of section 1605(a)(7) cases. Several considerations lead to this conclusion.

\* \* \* \*

. . The possibility that a cause of action might be based in the federal common law in the absence of section 1606 must give way to the instruction provided by Congress in section 1606. Accordingly, the Court does not find this to be one of the “few and restricted” cases where it is appropriate to fashion federal common law as the rule of decision. The desire for uniformity alone is not a sufficient reason to create federal common law, no other unique federal interest is implicated, and there is no significant conflict between some important federal policy or interest and the application of state law.

## 3. Federal Statutes

\* \* \* \*

In this case, plaintiffs wish to enforce two federal statutes against defendants through section 1606: the Flatow Amendment and the Torture Victim Protection Act (TVPA). Unlike the other federal statutes that have been applied to foreign states in this manner, these are not statutes of general application. Instead, their very terms confine their scope to officials or agents of foreign states. The Court does not reach the question whether any federal causes of action can be used to obtain damages from a foreign state through the operation of section 1606. However, it concludes that the two stat-

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utes plaintiffs propose cannot be expanded through section 1606 to apply to foreign states as well as foreign officials.

### a. The Flatow Amendment

\* \* \* \*

The touchstone of the necessary inquiry is the intent of Congress. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Thompson v. Thompson*, 484 U.S. 174, 179, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988). The Court concludes that Congress did not intend to create a cause of action under the Flatow Amendment against foreign states through section 1606. On its face, the statute only applies to officials, employees, or agents of a foreign state. There is no clue in the statute that Congress wished—or even anticipated—that the statute would apply to foreign states as well. . . .

Likewise, the legislative history does not contain “any indication that Congress intended to take the more provocative step of creating a private right of action against foreign governments themselves.” *Cicippio-Puleo*, 353 F.3d at 1031. The legislative history certainly does not contain any indication that Congress anticipated that the statute would encompass foreign states through the operation of one statute it had enacted only five months earlier (section 1605(a)(7)), and another it had enacted twenty years earlier (section 1606). Given the proximity in time between the enactment of the Flatow Amendment and section 1605(a)(7), one would expect some indication that Congress expected the Flatow Amendment to apply to foreign states, and the Court would require as much before writing that result into a silent federal statute.

It is noteworthy that the Flatow Amendment does not obviously create a cause of action against a “private individual” within the meaning of section 1606. See 28 U.S.C. § 1606 (“The foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”). Unlike RICO, Title VII, and the other statutes that clearly expose a private individual to liability, a Flatow Amendment claim can only be brought against an “official, employee, or agent” of a foreign state. It may well be that a private individual within the meaning of section 1606 can nonetheless be an “agent” within the meaning of the Flatow

Amendment. Nonetheless, on its face, the statute is aimed at public officials rather than private individuals. There is no reason to believe that Congress was aware at all of section 1606 and its potential for converting claims against private individuals into claims against states while it was enacting the Flatow Amendment. Even if it was, however, it is far from obvious that Congress would have understood that the small subset of Flatow Amendment cases that could involve a private party would lead to wholesale liability for federal states through section 1606.

Finally, allowing a Flatow Amendment claim to proceed against foreign states through section 1606 is a result that is in at least some tension with *Cicippio-Puleo*. That decision carefully examined the text and legislative history of section 1605(a)(7) and the Flatow Amendment and concluded that neither of those statutes, “nor the two considered in tandem, creates a private right of action against a foreign government.” *Cicippio-Puleo*, 353 F.3d at 1032. *Cicippio-Puleo* does not completely foreclose the possibility that a cause of action might exist under the Flatow Amendment other than of its own force or through section 1605(a)(7). Nonetheless, before reaching a result different than *Cicippio-Puleo*, the Court would require more compelling evidence of a will to create an action against foreign states in the Flatow Amendment than the mere enactment of section 1606 five months earlier.

\* \* \* \*

#### **b. The Torture Victim Protection Act**

\* \* \* \*

Unlike the Flatow Amendment, the TVPA was enacted several years before section 1605(a)(7). Therefore, it is at least plausible that Congress intended in enacting section 1605(a)(7) that all causes of action previously confined to individuals (and relating to the subject of section 1605(a)(7)) would be widened to foreign states. However, the legislative history of the TVPA gives the Court pause. The Senate Report is emphatic:

The legislation uses the term “individual” to make crystal clear that foreign states or their entities cannot be sued un-

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der this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

S. Rep. No. 102-249, at 7 (1991). The House Report contains similar language. See H.R. Rep. No. 102-367, at 87 (1992) (“Only ‘individuals,’ not foreign states, can be sued under the [TVPA].”).

\* \* \* \*

Congress’ plain intent in enacting the TVPA—as reflected in the text (which specifies only individuals) and the legislative history (which could not be clearer)—was to confine liability for acts of torture and extrajudicial killing to private individuals. To overcome this strong evidence of intent, the Court would require something more than the textual gymnastics of reading a 1996 statute (section 1605(a)(7)) as operating through a 1976 statute (section 1606) to expand a 1992 cause of action (the TVPA) to the states. Therefore, the Court concludes in this instance that Congress’s clearly expressed intent in 1992 should prevail over any speculative intent to the contrary in 1996.

### 4. Foreign Law

Plaintiffs also suggest that foreign law can be applied to their section 1605(a)(7) claims. The Court need not tarry long on this point. To the extent plaintiffs are proposing that the Court adopt Lebanon law specifically (as the law of the place of the tort), this argument is addressed by the Court’s reasoning in the choice of law discussion in Section II. D. 1. . . . To the extent plaintiffs are arguing for the adoption of stand-alone norms of international law as the rule of decision in this case, the argument is addressed in the discussion of *Sosa v. Alvarez-Machain* and the federal common law in Section II. D. 2. . . . In either case, foreign law does not supply the rule of decision in the circumstances of this case.

\* \* \* \*

(3) *Owens v. Sudan*

In an opinion also issued on March 29, 2005, the District Court for the District of Columbia denied defendants' motion to dismiss and allowed the plaintiffs to submit an amended complaint, in a case brought under FSIA §1605(a)(7) related to the August 1998 bombing of the U.S. embassies in Tanzania and Kenya. *Owens v. Sudan*, 374 F. Supp. 2d 1 (D.C. Cir. 2005). Excerpts follow from the court's analysis of the cause of action in that case. Plaintiffs filed an amended complaint on May 3, 2005; a motion by Sudan defendants to dismiss that complaint, filed on June 24, 2005, was pending at the end of 2005. *See also* 1.a. *supra*.

\* \* \* \*

2. Plaintiffs' Causes of Action

The Sudan defendants argue that the complaint fails to state a claim on which relief can be granted. They contend that the claims that are based expressly on the Flatow Amendment must be dismissed in light of the D.C. Circuit's decision in *Cicippio-Puleo* holding that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1032-33. The other claims must be dismissed as well, the Sudan defendants urge, because the common law cannot serve as the source of law for an action against a foreign state.

On this date, the Court is issuing an opinion in *Dammarell v. Islamic Republic of Iran*, Civil Action No. 01-2224, that addresses these and several other issues relating to the causes of action a plaintiff may bring against a foreign state in an action brought pursuant to section 1605(a)(7).

\* \* \* \*

Plaintiffs will need to make substantial changes to their complaint to conform to these holdings. . . .

\* \* \* \*

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Although the Court will not repeat the lengthy analysis in the *Dammarell* decision, the Court will take a moment to provide its views on two arguments to which the Sudan defendants devote particular attention in their papers. First, the Sudan defendants argue that the text of section 1605(a)(7) indicates that Congress did not intend to provide jurisdiction over common law causes of action. This argument is premised on the Sudan defendants' understanding that "sections 1605(a)(2) and 1605(a)(5), for example, explicitly provide jurisdiction over common law claims in tort and contract, but they just as explicitly require a nexus to activity and effects within the United States." Section 1605(a)(7), they argue, is different, because it has application anywhere in the world but also contains no reference to common law actions, suggesting that Congress wished to exclude them as part of the legislative compromise in the provision. . . .

This argument is without merit. First, the argument rests on a misreading of the statute. There is in fact a nexus to the United States in section 1605(a)(7)—the claimant or the victim must have been a national of the United States at the time of the act of terrorism, 28 U.S.C. § 1605(a)(7)(A)—and there is no express reference to a common law tort in section 1605(a)(2). More to the point, although section 1605(a)(7) undoubtedly reflects an attempt by Congress to strike a balance among several competing concerns, there is no indication at all that Congress chose to resolve these concerns by maintaining the sovereign immunity of a foreign state from common law causes of action. There was a "delicate legislative compromise" in section 1605(a)(7), but the D.C. Circuit has explained that it led to several concessions that appear on the face of the statute, including the decision to allow only state sponsors of terrorism to be sued, § 1605(a)(7)(A), and the choice to give a foreign state a reasonable opportunity to arbitrate for acts that take place within its boundaries, § 1605(a)(7)(B). *See Cicippio-Puleo*, 353 F.3d at 1035-36. This Court would require far clearer evidence of the intent of Congress (than the mere speculation of the Sudan defendants) before it would read an additional limitation found nowhere in the text of the statute into section 1605(a)(7) for common law claims.

The Sudan defendants also argue that there is a presumption that federal statutes do not govern the conduct of foreign persons on foreign soil, and therefore there must be a similar presumption for federal and state common law. . . . The answer to this argument is simple: the FSIA itself provides for the application of existing causes of action against foreign states. Even supposing there is a presumption that domestic common law should be inapplicable outside the United States, this presumption is overcome by the text of the FSIA, which creates a scheme in which domestic common law has been applied to claims arising under the other waivers of foreign sovereign immunity in section 1605 for almost thirty years. *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983) (“Where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.”); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (“The FSIA . . . operates as a ‘pass-through’ to state law principles.”). The Sudan defendants do not convince the Court that the rule should be any different for actions under section 1605(a)(7).

Finally, the Sudan defendants argue that plaintiffs’ claim for punitive damages should be dismissed in accordance with section 1606 of the FSIA, which provides that “a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.” . . . This rule certainly bars a claim for punitive damages against the Republic of Sudan itself. Whether the same is true of the Ministry of the Interior of the Republic of Sudan requires an analysis of whether the Ministry of the Interior is a “foreign state” within the meaning of section 1606, or an “agency or instrumentality thereof.” The D.C. Circuit held in *Roeder v. Islamic Republic of Iran* that Iran’s Ministry of Foreign Affairs “must be treated as the state of Iran itself rather than its agent” for purposes of the Flatow Amendment, explaining that “if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state.” 333 F.3d at 233.

This Court, in an earlier decision in *Dammarell* extended this reasoning to the punitive damages provision in section 1606, con-

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cluding that Iran's Ministry of Intelligence and Security must be treated as a foreign state rather than an agency or instrumentality. . . . *Dammarell*, 281 F. Supp. 2d at 199. . . . Until such time as plaintiffs can allege and prove that the Ministry of the Interior of the Republic of Sudan engages in predominantly commercial activities, the claim for punitive damages must be dismissed in its entirety. . . .

\* \* \* \*

In denying the motion to dismiss, the court reviewed at length each of the grounds raised by defendants for dismissal. Excerpts below provide the court's views on arguments concerning the constitutional validity of the statute.

The Sudan defendants raise a number of constitutional challenges to section 1605(a)(7) as well. They argue that section 1605(a)(7) represents an unconstitutional delegation to the executive of the legislative power to create jurisdiction in the federal courts; that it violates the equal protection clause by singling out certain foreign states that support acts of terrorism for suit while allowing others to retain their sovereign immunity; and that the definition of "material support or resources" incorporated from 18 U.S.C. § 2339A is unconstitutionally vague. Each of these arguments has been rejected in one form or another by prior decisions in this district court. This Court rejects them again today as applied to the facts of this case.

\* \* \* \*

### i. Unconstitutional delegation of power

Section 1605(a)(7) only waives the sovereign immunity of a foreign state that was "designated as a state sponsor of terrorism".

\* \* \* \*

. . . Congress exposed Sudan to the jurisdiction of this Court the moment it passed section 1605(a)(7) with Sudan already on the list of terrorist states. Therefore, it cannot be said that Sudan is subject to the jurisdiction of this Court by virtue of an unconstitutional delegation of power.



ii. Equal Protection

\* \* \* \*

[Defendants'] argument overlooks the important ways in which section 1605(a)(7) is the result of a "delicate legislative compromise." *Price*, 294 F.3d at 86. The legislative history reveals strong opposition to section 1605(a)(7) by executive branch officials expressing concern that the statute would disrupt the foreign policy of the United States and cause other nations to respond in kind. Although these concerns "did not prevent the amendment from passing, they nevertheless left their mark in the final bill," including the provisions ensuring that "not all foreign states may be sued." *Id.* The decision to expose to suit only those countries that "consistently operate outside the bounds of the international community by sponsoring and encouraging acts generally condemned by civilized nations" is an entirely reasonable accommodation of the competing interests considered in the crafting of the statute. *Daliberti*, 97 F. Supp. 2d at 52. This Court therefore joins the others that have rejected this equal protection challenge to section 1605(a)(7). . . .

iii. Void for vagueness

Finally, the Sudan defendants contend that the definition of "material support or resources" in 18 U.S.C. § 2339A adopted by section 1605(a)(7) is unconstitutionally vague. . . .

The allegations in the transcripts attached to plaintiffs' papers depict the Sudan defendants guarding al Qaeda officials with military personnel, transporting al Qaeda militants and weapons in and out of the country, protecting al Qaeda militants from the interference of police and other government officials, imprisoning informants who might identify al Qaeda officials, and supplying other forms of "lodging," "facilities," "personnel," and "transportation" that clearly lie within the compass of "material support or resources" in 18 U.S.C. § 2339A and do not raise any colorable First Amendment concerns. The definition of "material support or resources" therefore is not unconstitutionally vague as applied to the circumstances of this case. . . .

\* \* \* \*

## 5. No Enforcement of Monetary Contempt Sanctions

On April 12, 2005, the U.S. District Court for the Southern District of Florida found the government of Belize in contempt for failure to comply with a preliminary injunction order mandating a restructuring of the Belize Telecom board, and imposed sanctions of \$50,000 per day. *Belize Telecom, Ltd. v. Belize*, 2005 U.S. Dist. LEXIS 18592 (S.D. Fla. 2005).<sup>\*</sup> On September 2, 2005, the United States submitted to the U.S. Court of Appeals for the Eleventh Circuit a brief addressing the question “[w]hether a U.S. district court errs or abuses its discretion when it orders monetary contempt sanctions against a foreign state under the Foreign Sovereign Immunities Act.” The U.S. brief explained that

[i]n stating its views as *amicus curiae*, the United States wishes to make clear that it does not condone a foreign state’s failure to comply with the order of a U.S. court validly exercising jurisdiction over the state. Nevertheless, the legal framework established by Congress for litigation against foreign states does not permit enforcement of monetary contempt sanctions against a state. The imposition of such sanctions also contravenes international practice, and could adversely affect our nation’s relations with foreign states and open the door to reciprocal sanctions against our Government abroad.

Excerpts below from the U.S. brief provide its analysis of the issue (most footnotes deleted). The full text of the brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

In an unreported decision dismissing the appeal on October 8, 2005, the U.S. Court of Appeals for the Eleventh Circuit held that it lacked jurisdiction because the district court’s orders were not final and appealable. Therefore, the court did not reach the question addressed here and did not

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<sup>\*</sup> Following a trial in June 2005, on August 16, 2005, the district court issued a final decision in the case which, among other things, denied the plaintiffs’ motion for a permanent injunction and vacated the preliminary injunction. 2005 U.S. Dist. LEXIS 18586 (S.D.Fla. 2005).

accept the U.S. brief for filing. *Belize Telecom, Ltd. v. Belize*, 05-12641-CC (11th Cir. 2005).

\* \* \* \*

**A. The Foreign Sovereign Immunities Act Precludes Enforcement Of Monetary Contempt Sanctions Against A Foreign State.**

\* \* \* \*

The FSIA provides that a foreign state is immune from jurisdiction except as immunity is removed by statute, and further provides that a foreign state's property is immune from attachment, arrest, or execution except in the limited circumstances set forth in the Act. *See* 28 U.S.C. §§ 1604, 1609. Absent a foreign state's waiver of immunity from execution of an order of monetary sanctions—and there is no suggestion or evidence in this case that such a waiver exists—an order of monetary sanctions for failure to comply with a court order does not fall within any statutory exception to immunity from execution. *See* 28 U.S.C. §§ 1610(a), 1605(a)(7); *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-799 (2d Cir. 1984) (FSIA does not permit execution against foreign state's property of judgment resulting from non-commercial tortious conduct), *cert. denied*, 471 U.S. 1125 (1985). Thus, Congress has not provided any mechanism for a U.S. court to enter an enforceable contempt order imposing sanctions against an unwilling foreign state.

The conclusion that contempt sanctions may not be enforced against a foreign state except in accordance with the execution provisions of the FSIA is confirmed by the statute's legislative history. As set out in the House Report accompanying the legislation, Congress intended that, for a foreign state subject to jurisdiction,

liability exists as it would for a private party under like circumstances. \* \* \* Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. *But this is not determinative of the power of the court to enforce such an order.* For example, a foreign diplomat or

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official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. *Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610.*

*Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 94-1487, at 22 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.

Subsequent legislative history further demonstrates that the FSIA does not permit enforcement of monetary contempt sanctions against a foreign state. In considering proposed amendments to the FSIA in 1987, Congress heard testimony at a subcommittee hearing by Elizabeth Verville, Deputy Legal Adviser in the State Department, that the statute would not permit "imposition of a fine on a foreign state \* \* \* for a state's failure to comply with a court order." *Hearing on H.R. 1149, H.R. 1689, and H.R. 1888*, Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, 100th Cong., 1st Sess., at 19 (1987). Deputy Legal Adviser Verville explained that, although the FSIA does not "explicitly preclud[e] a court from imposing a fine on a foreign state \* \* \* [for] failure to comply with a court order," the statute's legislative history makes clear that sanctions of this sort are impermissible, a position that "is consistent with state practice" internationally. *Id.* at 36.

Finally, the structure of the FSIA and the legal landscape against which it was enacted support the conclusion that a U.S. court may not enforce monetary contempt sanctions against a foreign state. The primary argument in favor of enforceable contempt sanctions is that such authority is necessary to give effect to the jurisdiction conferred by Congress under the FSIA. As the Second Circuit recognized in *De Letelier*, however, in rejecting a claim that Congress could not have intended in the FSIA "to create a right without a remedy," the jurisdiction conferred over claims against foreign states does not carry with it the authority to enforce judgment on such claims. 748 F.2d at 798-799. Congress adopted the statute against "the background of the views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 en-

actment of the European Convention” as well as the state of the law in the United States prior to 1976. *Id.* at 799. Under both international law and pre-1976 U.S. law, a litigant could obtain a judgment against a foreign state under certain circumstances, but could not enforce that judgment against a foreign state’s property, which was immune from attachment. *See id.* In seeking enforcement, a litigant was left to seek diplomatic intercession by the United States Government or to rely on the willingness of a foreign state to honor judgments against it. Congress changed that rule “in part” in enacting the FSIA, but did not provide for plenary enforcement of the orders of U.S. courts, choosing instead to cabin courts’ enforcement authority in 28 U.S.C. §§ 1609-1611. . . .

Notably, the fact that a foreign state has waived its sovereign immunity to suit under Section 1605(a)(1) of the FSIA does *not* establish that the state is subject to enforcement of monetary contempt sanctions under Section 1609 and 1610(a). The significant and intentional disjunct between the jurisdictional and enforcement provisions of the FSIA precludes a court from finding a waiver of immunity from enforcement of contempt sanctions simply because a foreign sovereign has waived its immunity from jurisdiction with respect to particular claims. As a matter of practice, furthermore, it would be extremely unlikely for a foreign state to waive its immunity from enforcement of punitive, quasi-criminal sanctions of this type. As discussed below (at pp. 12-16 & n.2, *infra*), under the uniform laws and practices of other nations, a state may not be subject to coercive sanctions for noncompliance with a judicial order. Indeed, the laws of most countries bar a court even from ordering a foreign sovereign to take specific action. The district court’s contempt orders against the Government of Belize stand as the only known example of a court’s imposition of contempt sanctions on a foreign state. Under these circumstances, a foreign state’s implicit waiver of immunity from suit cannot reasonably be interpreted as a waiver of immunity from monetary contempt sanctions.

**B. Monetary Contempt Sanctions Against A Foreign State Contravene Equitable Principles And International Practice, And Could Have Significant Adverse Foreign Policy Consequences.**

Regardless whether a U.S. court has the power to enter a monetary sanctions order against a foreign state . . . basic principles of equity and comity should preclude such an order.

1. As we have explained, monetary contempt sanctions against a foreign state cannot be enforced absent a waiver of immunity from execution of those sanctions. “A court should not issue an unenforceable injunction” against a foreign state. *In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539, 545, 548 (9th Cir. 1996). In exercising its equitable authority, a court should be cautious that its orders will be effective and that they will utilize the least amount of force necessary to achieve the desired end. *See, e.g., Shillitani v. United States*, 384 U.S. 364, 371, 86 S. Ct. 1531, 1536 (1966); *cf. Virginian Ry. Co. v. System Fed’n No. 40*, 300 U.S. 515, 550, 57 S. Ct. 592, 601 (1937) (“[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.”).

The United States Government does not mean to condone a foreign state’s failure to comply with the order of a U.S. court. However, other remedies are potentially available to encourage a foreign state’s compliance. A district court may direct an adverse evidentiary presumption against a recalcitrant foreign state or may even, if the claimant can “establish[] his claim or right to relief by evidence satisfactory to the court,” enter a default judgment against the state. 28 U.S.C. § 1608(e). An aggrieved litigant may also pursue non-judicial remedies, including diplomatic intercession. As an equitable matter, however, a U.S. court should not enter an order of monetary sanctions against a foreign state that is immune from execution of any such order.

2. Foreign policy considerations also weigh strongly against the imposition of contempt sanctions in response to a foreign state’s failure to conform to a court directive purporting to control that state’s conduct.

In weighing the proper response to a foreign state’s failure to comply with an injunction, it is important to recognize the strongly

held view of many foreign states that they are not subject to coercive orders by a U.S. court. Absent specific evidence to the contrary, the refusal of a sovereign state to conform to a judicial directive should not be considered as an expression of scorn or contempt for which such sanctions are normally imposed. Rather, such a refusal may reflect a determination by that foreign state that a U.S. court lacks power to control its conduct. The laws in many foreign nations do not permit a court to enter an injunction against a foreign state, and the foreign state may expect the United States to extend to it the same respect and courtesy. The potential for affront is particularly heightened if the U.S. court purports to control the foreign state's conduct within its own borders, as was the case here.<sup>3</sup>

Furthermore, as this Court has recognized, it is important to consider issues of foreign sovereign immunity in light of foreign and international norms. See *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1999). Where U.S. practice diverges from international practice, our Government is vulnerable to reciprocal sanctions when it litigates abroad. Under the uniform laws and practices of other nations, monetary sanctions may not be imposed on a foreign state even if the state violates a court order.

Thus, for example, the European Convention on State Immunity bars a court from imposing monetary sanctions on a foreign state for refusal "to comply with a court order to produce evidence (contempt of court)." Under the Convention, a court faced with a foreign state's noncompliance is limited to remedies involving "whatever discretion [the court] may have under its own law to draw the appropriate conclusions from a State's failure or refusal to comply." European Convention on State Immunity, (E.T.S.

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<sup>3</sup> It is perhaps relevant in this regard that the preliminary injunction held to have been violated by the Government of Belize was premised on an interpretation of corporate and contract documents that was not only rejected by a Belizean court prior to the district court's order of monetary sanctions but also subsequently repudiated by the district court itself, which reversed course and entered judgment on the merits for the Government of Belize on nearly all counts. The district court's entry of a preliminary injunction apparently contributed to civil unrest and industrial sabotage in Belize and to significant disruption of that country's telecommunications network.



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No. 074), Explanatory Report, Point 70 (discussing Article 18) (convention entered into force June 11, 1976).

In a similar vein, the United Nations Convention on Jurisdictional Immunities of States and Their Property provides that “[a]ny failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act \* \* \* shall entail no consequence other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.” United Nations Convention on Jurisdictional Immunities of States and Their Properties, Article 24(1).

The United Nations Convention is not yet in force, and the United States is not a signatory to the Convention. Nevertheless, it is the position of the United States that a number of its provisions, including Article 24(1), reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state’s immunity from coercion. In the initial 1986 formulation of the draft Articles, the International Law Commission proposed two provisions barring courts from imposing coercive measures on foreign states, one of which recognized a state’s immunity “from any [judicial] measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.” Yearbook of the International Law Commission, 1986, Vol. II, Part Two, pp. 12, UN Doc. A/41/10, chap. II.D. Some states considered that formulation too narrow, with Mexico complaining that coercive measures “do not consist solely in monetary penalties,” and the United Kingdom protesting that the Articles should recognize state “immunity from the very possibility of having such an order made against it.” *International Law Commission: Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, UN Doc. A/CN.4/410, at 33 (Feb. 17, 1988). . . . As noted above, the final Convention directed that states would be immune from fines or penalties for failure to comply with an injunctive order, and that the only permissible consequences would be “those



which may result from such conduct in relation to the merits of the case.” United Nations Convention on Jurisdictional Immunities of States and Their Properties, Article 24(1).

Finally, individual nations other than the United States that have codified foreign sovereign immunity law, although relatively few in number, uniformly have protected foreign states from monetary sanctions for failure to comply with an injunctive order. Canadian law provides, for example, that “[n]o penalty or fine may be imposed by a court against a foreign state” for its failure to produce documents or other information to the court, and further provides that a state shall be immune *in toto* from any “injunction, specific performance or the recovery of land or other property.” Canadian State Immunity Act, §§ 12(1), 10(1). The United Kingdom State Immunity Act similarly provides that a foreign state may not be penalized with monetary sanctions for its failure to disclose or produce any document or other information in court proceedings, and also may not be subject to any “injunction or order for specific performance,” absent narrow circumstances not present here. UK State Immunity Act, § 13.

Singapore and Pakistan have also enacted immunity provisions essentially identical to those of Canada and the United Kingdom. *See* Singapore State Immunity Act, § 15; Pakistan State Immunity Ordinance, § 14. And Australian law provides that “[a] penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.” Australian Foreign States Immunities Act of 1985, § 34. In sum, the uniform international practice is to bar monetary contempt sanctions of the type ordered by the district court.

3. There is virtually no precedential support for the district court’s contempt orders. Indeed, this litigation is the only instance of which we are aware in which *any* court, domestic or foreign, has imposed monetary sanctions against a foreign state for failure to comply with a court order.

Although a small number of U.S. courts have ordered monetary contempt sanctions against an agency or instrumentality of a foreign state (as opposed to the central government itself), those courts have done so without considering whether the FSIA per-

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mits contempt sanctions to be enforced against the state agency or instrumentality. . . . In fact, to our knowledge, no court of appeals has ever considered whether a monetary contempt order may be enforced under the FSIA attachment provisions, and the only district court to consider the question has concluded that monetary contempt sanctions against a foreign state agency are *not* enforceable. *See United States v. Crawford Enterprises, Inc.*, 643 F. Supp. 370, 381-382 (S.D. Tex. 1986), *aff'd*, 826 F.2d 392 (5th Cir. 1987); *see also* J. Dellapenna, *Suing Foreign Governments and Their Corporations* 742 (2d ed. 2003) (recognizing that “there may be no way to enforce” monetary contempt sanctions against a foreign state given the “severe restrictions on executing judgments”).

The conclusion that monetary contempt sanctions should not be imposed against foreign states gains support, moreover, from the analogous context of courts’ treatment of the United States Government. The United States Government is immune from the jurisdiction of U.S. courts except to the extent that its immunity has been abrogated by Congress. Numerous courts have recognized that, even where Congress has waived the United States’s immunity to suit, the Government may not be ordered to pay monetary sanctions for violation of a court order absent an explicit waiver of sovereign immunity for such sanctions. . . .

Finally, in determining the propriety of an order of contempt sanctions, it is significant that, even if the order is unenforceable, it would likely be viewed by the foreign state as a suggestion of purposeful wrongdoing, and could offend the dignity of the foreign State. *Cf. In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (noting that contempt order against high-level Greek officials “offends diplomatic niceties even if it is ultimately set aside on appeal”). In considering the potential for affront in this litigation, it is striking that the amount of the sanction order by the district court here—\$50,000 *per diem*—is equivalent to nearly 2% of Belize’s daily gross domestic product, under the most recent statistics provided by the World Bank. *See* <<http://devdata.worldbank.org/external/CPPProfile.asp?SelectedCountry=BLZ&CCODE=BLZ&CNAME=Belize&PTYPE=CP>> (Belizean 2003 GDP = \$988.5 million, or \$2.7 million per day). Were a foreign court to assert the

same extraordinary power over the United States Government that the district court has asserted in this litigation over the Government of Belize, it would undoubtedly lead to great public outcry. As this Court has cautioned, in interpreting and applying the FSIA, it is vital to “consider[] the potential impact of our FSIA interpretations on foreign litigation involving the United States and its interests.” *Aquamar, S.A.*, 179 F.3d at 1295.

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## 6. Collection of Judgments

### *a. Attachment of properties of the Palestinian Authority*

On March 31, 2005, the U.S. Court of Appeals for the First Circuit rejected arguments by the Palestinian Authority (“PA”) and Palestine Liberation Organization (“PLO”) that an action against them arising from the deaths of an American and his Israeli wife should be dismissed on grounds of sovereign immunity and nonjusticiable political question. *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005). The court refused to vacate two default judgments entered by the district court. *See* 1.b.(1) *supra*. Subsequently, plaintiffs in the case moved to enforce their judgments by seeking the sale and eviction of the Palestinian Permanent Observer Mission to the United Nations in New York City. The United States filed a Statement of Interest in the District Court for the Southern District of New York, requesting that the court “[i]n consideration of the strong foreign policy interests at stake here, . . . dismiss this matter on any available legal ground.” The plaintiffs withdrew their request to attach the mission after oral argument.

The full text of the Statement of Interest, filed September 12, 2005, and excerpted below (footnotes omitted), is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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A. In General, Decisions Concerning The Disposition Of  
Mission Real Property Are Confined By Statute And By The  
Constitution To The Executive Branch—And That Authority  
Has Here Been Exercised

The United States Constitution vests exclusive authority in the Federal Government, and substantial authority in the Executive Branch, regarding the conduct of foreign affairs. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14, 123 S. Ct. 2374, 2386 (2003) (citations omitted). . . .

The general commitment of foreign relations to the Executive Branch is reinforced in the particular area of foreign missions, where the Executive Branch acts not only pursuant to broad constitutional authority but also pursuant to express statutory authority. Specifically, Congress has conferred authority over the sale or acquisition of foreign mission property to the Executive; it did so precisely because such transactions necessarily implicate foreign policy concerns. Pursuant to the [Foreign Missions Act (“FMA”)], the Secretary of State is charged with determining the “treatment to be accorded to a foreign mission in the United States.” 22 U.S.C. § 4301(c). In acting pursuant to the FMA, the Secretary of State is directed to give due consideration not only to the treatment accorded to United States missions abroad but also to matters of foreign policy and national security, *i.e.*, “matters relating to the protection of the interests of the United States.” *Id.*; *see also* 22 U.S.C. § 4301(b). The FMA bestows upon the Secretary broad and substantial authority to, for example, regulate the provision of benefits to missions, *see* 22 U.S.C. § 4304, and to require a mission to divest itself of real property where “necessary to protect the interests of the United States,” 22 U.S.C. § 4305(b).

. . . [O]f particular relevance here, the FMA also authorizes the Secretary to approve or disapprove any acquisition or disposition of property of foreign missions. *See* 22 U.S.C. § 4305(a)(1) (requiring foreign missions to notify the Secretary of “any proposed acquisition, or any proposed sale or other disposition, of any real property by or on behalf of such mission” and bestowing upon the Secretary the power to determine whether or not to allow such actions). Decisions made pursuant to the FMA, including Section 4305(a), are expressly committed to the Secretary’s discretion,

which is deliberately very broad under this statute. *See* 22 U.S.C. § 4308(g) (“Except as otherwise provided, any determination required under this chapter shall be committed to the discretion of the Secretary.”); *see also* 22 U.S.C. § 4302(b) (determinations of the “meaning and applicability” of terms used in the FMA “shall be committed to the discretion of the Secretary”).

In enacting the FMA, Congress was acutely aware that it was legislating in the field of foreign affairs, where the Executive Branch is preeminent and where expertise and political judgment are essential. Because the Secretary of State makes decisions about foreign missions with express congressional authorization pursuant to the FMA, she “exercises not only [the executive] powers but also those delegated by Congress.” *Dames & Moore v. Regan*, 453 U.S. 654, 668, 101 S. Ct. 2972, 2981 (1981). Her actions are therefore “supported by the strongest of presumptions and the widest latitude of judicial interpretation,” with the “burden of persuasion. . . rest[ing] heavily upon any who might attack [them].” (quoting *Youngstown*, 343 U.S. at 637, 72 S. Ct. at 871) (Jackson, J., concurring)). . . .

Clearly, the FMA does not automatically preclude the routine application of state and local laws that might place incidental burdens on foreign missions; at the same time, the Secretary’s discretion to exercise statutory authority, together with independent constitutional authority exercisable by the Executive Branch, was expressly preserved. *Cf.*, 22 U.S.C. § 4307 (providing that certain statutory provisions do not, of their own accord, preempt zoning, land use, health, safety, or welfare laws and authority, but that “a denial by the Secretary involving a benefit for a foreign mission within the jurisdiction of a particular State or local government shall be controlling”). Whatever the difficulty of reconciling state and local regulatory authority with the Secretary’s authority in the abstract, the conflict posed by the Plaintiffs’ desired remedy is patent. Since the enactment of the FMA, the Secretary of State, exercising constitutional and statutory authority vested in the Executive Branch and in her office, has permitted the Palestinian Observer Mission to operate in New York City in property which it owns. *See* Drori Dec., Exh. J, at 2 (Letter from Department of State Legal Advisor to Assistant Attorney General, Civil Division, Department

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of Justice, dated September 7, 2005). Were the Observer Mission to seek to dispose of that property itself—even to satisfy a monetary judgment obtained against it, in preference to employing other assets—the Secretary’s permission would have to be obtained before any transaction could be completed. *See* 22 U.S.C. § 4305(a)(1). The fact that Plaintiffs seek to make that decision on the Observer Mission’s behalf does not minimize the inconsistency with the Secretary’s authority, and indeed accentuates it. On their theory, a subsequent decision by the Secretary to permit the Observer Mission to acquire new property—which would be realized by a decision not to disapprove such acquisition within the 60-day statutory period provided for by 22 U.S.C. § 4305(a)(1)(A)—would equally be subject to attack, until such point as Plaintiffs’ judgments (and any others) were fully satisfied. Appointing a receiver risks setting in motion a process by which the Secretary of State’s delicate judgments are repeatedly overridden.

The significant injury this relief poses to the United States’ foreign policy interests is described in Part II, *infra*. It is evident, in any event, that it is impossible simultaneously to maintain the Secretary’s decision to permit the Observer Mission to own and operate at the specified location that Plaintiffs seek to attach, and at the same time afford Plaintiffs the relief they seek. Under such circumstances, when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” it may not be applied. *Crosby*, 530 U.S. at 373, 120 S. Ct. at 2294. . . . The evidence is “more than sufficient to demonstrate” that the requested relief “stands in the way of [the Federal Government’s] diplomatic objectives.” *Crosby*, 530 U.S. at 386, 120 S. Ct. at 2301 (citing conflicts with Congressionally-specified objectives); *accord Garamendi*, 539 U.S. at 427, 123 S. Ct. 2393 (citing conflicts with Presidential diplomatic objectives).

### B. In General, Decisions Regarding The Disposition Of Foreign Missions Are Not Suited To Judicial Resolution—As Particularly Evident In This Matter

Recognizing the constitutional commitment of foreign affairs to the Executive Branch, courts have long accorded the Executive Branch the “utmost deference” in matters involving the conduct of

foreign affairs. *See, e.g., Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30, 108 S. Ct. 818, 825 (1988) (“The Court . . . has recognized the generally accepted view that foreign policy was the province and responsibility of the Executive. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.”) (citations and quotation marks omitted). . . .

This deference is due, in no small part, to the understanding that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Haig*, 453 U.S. at 292, 101 S. Ct. at 2774. The Supreme Court has acknowledged that courts are not capable of “determining precisely when foreign nations will be offended by particular acts,” and that the “nuances” of United States foreign policy “are much more the province of the Executive Branch and Congress” than that of the courts. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196, 103 S. Ct. 2933, 2955, 2956 (1983); *see also Crosby*, 530 U.S. at 386, 120 S. Ct. 2301 (same). Judicial pronouncements in areas touching on foreign policy may also disrupt the “concern for uniformity in this country’s dealings with foreign nations that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.” *Garamendi*, 539 U.S. at 413, 123 S. Ct. at 2386 . . . ; *see First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769, 92 S. Ct. 1808, 1814 (1972) (plurality opinion) (explaining that act of state doctrine was “fashioned because of fear that adjudication would interfere with the conduct of foreign relations”); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S. Ct. 1813, 1822 (1979) (noting that dormant Foreign Commerce Clause doctrine protects the National Government’s ability to “speak with one voice” in regulating commerce with foreign nations) (citation omitted).

Mindful of these concerns, courts construing the FMA have regarded the types of decisions at issue here as confined to the Executive Branch. As the District of Columbia Circuit noted, “[w]hen exercising its supervisory function over foreign missions [as it does pursuant to the FMA], the State Department acts at the apex of its power.” *Palestine Information Office*, 853 F.2d at 937; *see also id.*



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at 934 (holding that the “wisdom of the government’s decision” to close the Palestine Information Office under the FMA is “not at issue” because “[s]uch policy questions are firmly lodged in the political branches of government”). In enacting the FMA, Congress explicitly committed “discretionary authorities” to the Secretary in order “to provide the flexibility, which the Department of State has not heretofore possessed, to enable the Secretary to decide which sanction or other response is most appropriate to solve a specific problem.” . . .

The unsuitability of judicial pronouncements on matters of delicate foreign relations is, if anything, magnified by the nature of the inquiry at issue in this matter. Plaintiffs seek a determination from the Court as to the disposition of a foreign mission—a determination that is not only confined in the Secretary of State by Congress pursuant to the FMA, but which, when made by the Secretary, involves the weighing of a wide range of policy factors, including foreign policy factors, that are the province of the Executive Branch. Those factors include, as a general matter, whether a mission should be permitted to open or made to close; how best to implement United States obligations under international agreements; the requirements of diplomatic and foreign relations, in light of current events, with all affected nations and international organizations; the benefits of making comparable and consistent decisions with regard to foreign missions; the domestic security interests of the United States; and the practical feasibility or infeasibility of alternative options. . . .

Under analogous circumstances implicating the separation of powers, courts have been careful to avoid intruding upon the prerogatives of the Executive Branch. *See, e.g., Dep’t of the Navy*, 484 U.S. at 529-30, 108 S. Ct. at 825; *Regan*, 468 U.S. at 242-43, 104 S. Ct. at 3038. Under the facts at issue here, given the Secretary of State’s decisions in furtherance of constitutional and statutory authority plainly implicating political and foreign policy expertise of the greatest delicacy, the discretionary remedy sought by the Plaintiffs should not be granted, and the matter dismissed on any available legal ground.



## II. THE FOREIGN POLICY INTERESTS OF THE UNITED STATES

In the exercise of its constitutional and legislatively delegated authority, the United States considers and has considered it to be in the foreign policy interests of the United States to allow the PLO to continue to own and operate its observer mission at the current location in New York City. *See Drori Dec., Exh. J. . . .* It is the express judgment of the United States that the relief sought by Plaintiffs in this matter would effectively prevent the Mission from operating by interfering with its ability to conduct its business with the United Nations at a crucial moment in the Middle East Peace Process. *See Drori Dec., Exh. J, at 2-4.* This result would significantly and negatively affect the United States' foreign policy objectives and would seriously disrupt and contravene the well-recognized authority of the Executive to determine and guide American foreign policy. Moreover, these same concerns attach to Plaintiffs' proposal that the Observer Mission can make a "simple and easy move" to another location or lease from an as-yet unidentified landlord. . . . Indeed, . . . the FMA bestowed upon the Secretary the authority to review any sale, purchase, or lease of property by missions precisely because of both the inextricable connection of such issues to matters of foreign policy and the unsuitably of those issues to judicial management.

### A. The Relief Requested By Plaintiffs Would Seriously Undermine The United States' Foreign Policy Goals For The Middle East

As a preliminary matter, it is the judgment of the United States that the relief requested by Plaintiffs "would have a negative impact at an extraordinarily sensitive moment in the negotiations to resolve the Middle East conflict." *Drori Dec., Exh. J, at 3.* The United States is deeply involved at the highest levels in promoting a "Roadmap to a Permanent Two State Solution to the Israeli-Palestinian Conflict," which articulates a vision of the development of "an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors." *See Drori Dec., Exh. L (Press Release, United States Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30,*

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2003)) The United States has a national security interest in helping Israel and the Palestinians end the ongoing violence and move forward with negotiations. *See* Drori Dec., Exh. J, at 3-4. Encouraging both the new Palestinian leadership and ongoing reform of Palestinian institutions is a key component of the United States' strategy for peace in that region. *Id.* at 3. A just, lasting, and comprehensive peace between Israel and its neighbors has been a long-standing foreign policy goal of the United States in the Middle East, and the United States must maintain its ties and contacts with all sides in order to advance that goal. *Id.* After four years of violence, recent actions taken by Israel to disengage its forces and withdraw its civilians from the Gaza Strip and parts of the West Bank have created a promising opportunity for renewed efforts to implement the Roadmap and achieve its central goals. *Id.* at 3-4.

In promoting implementation of the Roadmap, it is crucial for the United States to have clear channels of communication with both parties and to retain their confidence. *Id.* at 4. It is the judgment of the United States that the proposed dispossession of the Palestinian Observer Mission of the premises in which it has been operating for more than 30 years, at a time when both the PLO and the Palestinian Authority have new, moderate leadership in the person of Mahmoud Abbas, would disrupt an important line of communication and would likely be perceived as signaling a lack of United States support for the new leadership. *Id.* As a result, it could undermine Palestinian confidence in the United States at an especially delicate time in the peace process. *Id.*

Moreover, a functioning Palestinian Observer Mission serves United States foreign policy interests because the United Nations itself is one of the four members of the "Quartet" sponsoring the Roadmap, and as such plays a key role in international efforts to promote a peaceful resolution of the Israeli-Palestinian dispute. *Id.* The United Nations serves as a forum for broader efforts and discussions concerning the peace process. *Id.* For that process to succeed, it is the judgment of the United States that the Palestinians must be allowed to participate unhindered in the United Nations forum. If the United States Government is seen to obstruct the ability of the Palestinians to engage in the United Nations discussions, the ability of the United States to effectively promote the peace pro-

cess will be undermined. *Id.* The PLO, and likely the international community at large, would regard this action as a breach of our international obligations and an effort to marginalize the Palestinian voice at the United Nations. The result would be reduced influence by the United States over events of vital national security importance at a most sensitive time. *Id.*

Accordingly, for all of these reasons, it is the position of the United States that the relief sought by Plaintiffs would interfere with the Executive Branch's ability to pursue vital foreign policy objectives in the Middle East.

B. The Relief Requested By Plaintiffs Would Interfere With The United States' Relationship With The United Nations

It is also the United States' position that an order evicting the Observer Mission "would . . . cause serious embarrassment to the United States in its relations with the United Nations." Drori Dec., Exh. I, at 3. While the United Nations has not yet expressed its position in this matter, the United States anticipates that the United Nations would regard any order from this Court depriving the Observer Mission of its property as a violation of the United States' obligations under the Headquarters Agreement. *See id.* (noting the likelihood of a United Nations General Assembly condemnation of any forced sale of property and the possibility that it will seek an advisory opinion from the International Court of Justice that the forced sale contravenes United States obligations under the Headquarters Agreement). Indeed, the General Assembly of the United Nations previously took the position that closure of the Observer Mission would violate the Headquarters Agreement. In reaction to the proposed passage of the Anti-Terrorism Act of 1987, 22 U.S.C. § 5201 et seq. ("ATA"), whose terms the United Nations construed to require closure of the Observer Mission, the General Assembly adopted Resolution 42/210(B) by which it "[r]eiterate[d] that the [Observer Mission] is covered by the provisions of the [Headquarters Agreement]" and requested that the United States "abide by its treaty obligations under the Headquarters Agreement and refrain from taking any action that would prevent the discharge of the official functions of the" Observer Mission. *See* Drori Dec., Exh. 0 . . . The Resolution reflected also the position of the Secretary General:

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“The members of the [Palestinian Observer Mission] are . . . invitees to the United Nations. As such, they are covered by sections 11, 12 and 13 of the Headquarters Agreement of 26 June 1947.” *Id.* (quoting Statement of the Secretary General of the United Nations, dated October 22, 1987).

The United Nations’ position on the Headquarters Agreement is especially relevant to the United States’ foreign policy interests because Section 21 of the Headquarters Agreement provides that any dispute between the United States and United Nations “concerning the interpretation or application of” the Headquarters Agreement “shall be referred for final decision to a tribunal of three arbitrators” who shall “render a final decision.” Drori Dec., Exh. A (Headquarters Agreement, § 21); *see also* Drori Dec., Exh. P (Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, 26-27, 35 (Apr. 26) (advisory opinion from International Court of Justice that United States and United Nations were “under an obligation . . . to enter into arbitration” in order to resolve a dispute concerning the interpretation/application of the Headquarters Agreement)). If this Court were to grant Plaintiffs’ request and order the sale of the Observer Mission, there is a distinct possibility that the United Nations would call for international arbitration with the United States pursuant to Section 21 of the Headquarters Agreement. *See* Drori Dec., Exh. J, at 3. The United States would then have to submit to international arbitration—or refuse to do so and risk further conflict with the United Nations—and to confront the political and legal quagmire that would result if the arbitrators rendered a decision in favor of the United Nations.

In that regard, the United States respectfully calls the Court’s attention to *United States v. PLO*, 695 F. Supp. 1456 (S.D.N.Y. 1988), in which Judge Palmieri of this Court concluded that closure of the Observer Mission would violate the Headquarters Agreement because it would interfere with and impair the Mission’s ability to carry out its functions as an invitee of the United Nations. *Id.* at 1471. *United States v. PLO* is a case that arose in connection with the 1988 passage of the ATA, which, among other things, forbade the establishment or maintenance of “an of-

fice, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the” PLO “notwithstanding any provision of law to the contrary.” 22 U.S.C. § 5202(3). When the PLO failed to comply with the ATA by closing its Observer Mission, the United States sought injunctive relief to force compliance. *United States v. PLO*, 695 F. Supp. at 1460-61. Judge Palmieri dismissed the Government’s lawsuit, holding that the ATA was not intended to apply to the Observer Mission because of the Headquarters Agreement, and therefore could not be used to close the Mission. *Id.* at 1471 (“The ATA and its legislative history do not manifest Congress’ intent to abrogate th[e] obligation” of the United States under the Headquarters Agreement to “*refrain from impairing the function* of the PLO Observer Mission.”) (emphasis supplied).

In the course of his decision, Judge Palmieri performed an exhaustive review of both United States practice under the Headquarters Agreement and statements made by the Executive Branch concerning the United States’ obligations under the Headquarters Agreement. For example, he observed that “there can be no dispute that over the forty years since the United States entered into the Headquarters Agreement it has taken a number of actions consistent with its recognition of a duty to refrain from impeding the functions of observer missions to the United Nations.” *Id.* at 1466 (noting also that the “United States has, for fourteen years [since the establishment of the Observer Mission in 1974], acted in a manner consistent with a recognition of the PLO’s rights in the Headquarters Agreement”). Moreover, after citing various statements made by the Department of State and the United States’ representative to the United Nations, Judge Palmieri concluded that “[i]t seemed clear to those in the executive branch that closing the PLO mission would be a departure from the United States’ practice in regard to observer missions. . . .” *Id.* at 1467 (citing, among others, a statement by the United States’ representative that “closing the mission, in our view, and I emphasize this is the executive branch, is not consistent with our international legal obligations under the Headquarters Agreement”). Judge Palmieri further noted that both Secretary of State George P.

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Shultz and the Honorable Abraham Sofaer, Department of State Legal Adviser, had expressed their views that closure of the Observer Mission would violate the Headquarters Agreement. *Id.* at 1470 n.35 (1987 letter from Secretary Shultz to unnamed Senators and Congressman averring that “[a]s far as the closure of the PLO Observer Mission is concerned, this would be seen as a violation of a United States treaty obligation under the United Nations Headquarters Agreement); *id.* at 1470 n.36 (1988 quote in the *New York Times* attributed to Judge Sofaer that it is “our judgment that the Headquarters Agreement as interpreted and applied would be violated” by the ATA). All of this together led Judge Palmieri to hold that the “language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations.” *Id.* at 1468 (emphasis supplied).)

Accordingly, because decisions concerning foreign missions are both constitutionally and legislatively committed to Executive Branch as a matter of federal law, because the Executive Branch has concluded that it is in the United States’ interest to allow the Palestinian Observer Mission to operate from the property that it owns, and because the requested relief would interfere with the Executive Branch’s foreign policy objectives, the United States respectfully submits that the Court should give great weight to the United States’ foreign policy interests here and dismiss this matter. *See, e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004) (where the United States offers its opinion on matter of foreign policy, “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”); *Republic of Austria v. Altmann*, 541 U.S. 677, 702 124 S. Ct. 2240, 2255 (2004) (where United States files a statement of interest concerning the exercise of jurisdiction over foreign sovereigns, “that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy”).

***b. Attachment of certain Iranian property***

***(1) Rafii v. Iran***

On October 25, 2005, the U.S. District Court for the District of Columbia quashed writs of attachment served against certain properties to enforce a December 2, 2002, judgment against Iran and the Iranian Ministry of Information and Security ("MOIS"). *Rafii v. Iran*, No. 01-850 (D.D.C. 2005). The court concluded that none of the properties at issue were subject to attachment under the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (2002).

In so doing, the court specifically rejected the reasoning of another judge of the same court in temporarily allowing attachment of certain consular accounts (referred to as the "Third and Fourth Accounts") in *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53 (D.D.C. 2003).\*

In *Rafii* the court also observed that "subsequent decisions by the D.C. Circuit and courts within the United States District Court for the District of Columbia have undermined the legal reasoning employed by this Court in rendering its final [December 2, 2002] judgment in favor of Plaintiff." In particular, the court noted two developments since the date of the judgment: 1) as to punitive damages against MOIS included in the judgment, a subsequent decision holding that MOIS was to be considered the foreign state of Iran itself rather than its agent, and thus could not be liable for punitive damages under the statute (*Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003)); and 2) two decisions "overturn[ing] [the] assumption that Plaintiff could maintain a cause-of-action against Defendants Iran and the MOIS pursuant to the sovereign immunity exception provided un-

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\* On March 23, 2005, the Third and Fourth Accounts were also made subject to attachment in *Rubin v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5022 (D.D.C. 2005). Relying in part on the *Weinstein* decision rejected by the *Rafii* court, the court in *Rubin* concluded that the two accounts were not "being used exclusively for diplomatic or consular purposes" because the property was not "operatively employed for diplomatic or consular purposes."



der Section 1605(a)(7) . . . and the Flatow Amendment.” (*Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004) and *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), discussed in *Digest 2004* at 501-08). The court concluded, however, that it would “not exercise its limited discretion under Federal Rule of Procedure 60(b) to vacate” that judgment (emphasis in the original).

Excerpts below from the court’s opinion provide its analysis in concluding that none of the properties at issue were subject to attachment. The full text of the unpublished memorandum order is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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B. The United States’s Motion to Quash Plaintiff’s Writs of Attachment

After [previous rulings quashing certain aspects of five writs of attachment filed by the Plaintiff], two issues remain pending for the Court’s resolution: (1) whether the Third and Fourth Accounts are subject to attachment by Plaintiff under the TRIA, and (2) whether the Iranian diplomatic and consular properties identified by Plaintiff that have been leased to third parties are subject to attachment under the TRIA. The Court shall deal with each issue in turn.

1. The Third and Fourth [blocked consular] Accounts

. . . Upon an examination of the relevant facts surrounding this issue, the statutes and treaties implicated by Plaintiff’s attachment, and the Executive Branch’s interpretation of its obligations, the Court concludes that the Third and Fourth Accounts fall within the exclusion provided by Section 201(d) of the TRIA and therefore cannot be attached. As such, any writ of attachment by Plaintiff implicating the Third and Fourth Accounts must be quashed.

The TRIA enables judgment creditors to execute on or attach certain “blocked assets” to satisfy outstanding judgments. Specifically, Section 201(a) of the TRIA provides:

IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b), in every case



in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. A “blocked asset” is defined as “any asset seized or frozen by the United States under . . . the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702);” however, a “blocked asset” *does not include* property that “in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic and consular purposes.” Pub. L. No. 107-297, § 201(d)(2), 116 Stat. at 2339-40. Upon a review, the Third and Fourth Accounts fall within this exclusion.

First, the Third and Fourth Accounts held by the Bank of America are clearly subject to the United States’s obligations under the Vienna Conventions. Where, as was the case with Iran, diplomatic relations between the United States and a foreign country are severed, the United States has an international legal obligation under the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations to protect the foreign country’s diplomatic and consular missions, their premises, and their property in the United States. See Art. 45(a), Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502 (Apr. 18, 1961); Art. 27(1)(a), Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963).

As outlined in the Taylor Declaration, Gov’t Mem. in Support of Mot. to Quash, Ex. 9 (“Taylor Decl.”), the Third and Fourth Accounts were licensed for consular use shortly after the issuance of the November 14, 1979 Blocking Order. . . . [I]n light of the clear intent that these accounts were to be used for the official businesses

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of the consular offices with which they were associated, the Court concludes that they constitute “property of the consular post” as specified in the Vienna Conventions.

Moreover, the Court is convinced that these accounts are being “used exclusively for consular and diplomatic purposes” for two reasons. First, while these accounts have been presumably inactive since the severance of diplomatic relations with Iran in 1980, they were not transferred upon the signing of the Algiers Accords. Instead, the Third and Fourth Accounts remain blocked by the United States in furtherance of its obligations to “protect and preserve” foreign government consular property in light of the failure of Iran and the United States to reach some other arrangement regarding their respective properties. . . .

Accordingly, it is clear that the United States government interprets its duty under the Vienna Conventions to continue to respect and protect these propert[ies] until some further agreement. Second, Iran has filed a claim in the Iran-U.S. Claims Tribunal, which was created by the Algiers Accords, concerning its diplomatic and consular properties that remain in the United States. . . . Importantly, this claim includes the Third and Fourth Accounts. *Id.* As such, dissipating these properties prior to the resolution of this process would compromise these proceedings, exacerbate a diplomatic relations problem, and override part of the diplomatic functioning of the United States. . . .

The Court is aware that the court in *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53 (D.D.C. 2003), temporarily allowed the attachment of the funds located in the Third and Fourth Accounts, *see id.* at 61-62, though the writs at issue were later quashed on other grounds. The *Weinstein* court reasoned that these funds could be attached because: (1) it believed that the Vienna Conventions only required that the United States protect the “premises of the mission” itself, i.e., the buildings and land of the consulate, and not the kind of funds contained within the Third and Fourth Accounts, and (2) it concluded that the fact that the accounts were dormant and not presently in use for any diplomatic or consular purpose meant that they could not be exempt from the TRIA’s definition of “blocked assets.” *Id.* The Court finds both of these conclusions to be erroneous. First, the language of the Vienna

Conventions clearly requires the protection of all diplomatic and consular property—not just the physical premises of the mission. See Art. 45(a), Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502 (“If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled: (a) the receiving State must, even in the case of armed conflict, respect and protect the premises of the mission, *together with its property* and archives”) (emphasis added); Art. 27(1)(a), Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820 (“In the event of a severance of consular relations between the two States: (a) the receiving State shall, even in the case of armed conflict, respect and protect the consular premises, *together with the property of the consular post* and the consular archives”) (emphasis added). Second, even though dormant, the accounts are still “being used exclusively for diplomatic and consular purposes,” Pub. L. No. 107-297, § 201(d)(2), 116 Stat. at 2339-40, as they are being maintained in a blocked status solely for the diplomatic purpose of “respect[ing]” and “protect[ing]” that property as required by the Vienna Conventions and preserving U.S. claims within Iran.

Given these facts, the Court concludes that because the Third and Fourth Accounts were previously used to fund Iran’s consular operations and are now being “used” through their preservation to fulfill the United States’s diplomatic purpose of complying with the Vienna Conventions and its obligations under the Algiers Accords, they are not subject to attachment under the TRIA. Accordingly, the funds at issue fall within the exemption provided by Section 201(d), and Plaintiff’s remaining writs of attachment—as they implicate the Third and Fourth Accounts—must be quashed.

## 2. Iranian Diplomatic and Consular Properties Leased to Third Parties

In its initial motion to quash, the United States identified five Iranian diplomatic properties in the District of Columbia that are currently in the custody of the Department of State, and which would be subject to Plaintiff’s writ of attachment served on the Department of State. Of these five properties, four are leased to third parties while the other remains a vacant lot. Taylor Decl. ¶¶ 15-19. Plaintiff claims that these assets fall within the attachable

category of “blocked assets” because (1) they fall within Executive Order 12170 and (2) the fact that they are being used by third parties—i.e., for “non-diplomatic purposes”—means that these properties therefore fall outside of the “diplomatic purposes” exemption provided in Section 201(d) of the TRIA. As such, Plaintiff asserts that these properties are ripe for attachment.

Upon a review of the issues, the Court concludes that these properties in question are “being used exclusively for diplomatic or consular purposes,” Pub. L. No. 107-297, § 201(d)(2), 116 Stat. at 2339-40, and are therefore exempt from attachment under the TRIA despite the fact that some of these properties are being rented to third-parties. Importantly, the United States is charged under the Vienna Conventions with protecting and respecting Iranian diplomatic property despite the breakdown of relations between the two countries. In order to do so, the Office of Foreign Missions—the agency charged with carrying out this responsibility—has determined that the best course of action would be to lease out or hold these properties because in renting and/or holding these properties, as opposed to selling them, the United States accomplishes at least two different purposes: (1) it ensures that the properties remain within its ultimate control, protecting the property for a presumptive future time when Iran and the United States resume diplomatic and consular relations; and (2) it uses the funds earned to carry out routine maintenance on the properties, thereby “respect[ing] and protect[ing]” the property as required. Accordingly, even though some of the properties identified have been leased to third parties, ultimately they are still being used “exclusively for diplomatic purposes” and thereby fall outside of the definition of “blocked assets” for the purposes of the TRIA. As such, Plaintiff’s writs of attachment on these and similar properties must be quashed. *See Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 493-96 (5th Cir. 2004) (holding that although the United States has leased Iranian property to “private parties and has used some of those rental proceeds to satisfy domestically-created obligations, it has used the consular residence ‘exclusively for diplomatic or consular purposes’”). . . .

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(2) Ministry of Defense v. Elahi

In response to an order of the Supreme Court inviting the Solicitor General to provide the views of the United States, in December 2005 the United States filed a brief as *amicus curiae* in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") v. Elahi*, No. 04-1095. The Court of Appeals for the Ninth Circuit had concluded that an MOD arbitral award against Cubic Defense Systems ("Cubic judgment"), confirmed by the District Court for the Southern District of California in 1998, could be attached to satisfy a default judgment against Iran and the Ministry of Information and Security ("MOIS") for the assassination of Dr. Cyrus Elahi in Paris in 1990. See *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), discussed in *Digest 2004* at 516-17.

In the U.S. view, two of the issues presented in the petition for writ of certiorari did not warrant review. On the evidence before it, the court of appeals was correct in deciding both that the property was not immune under the military property exception, 28 U.S.C. § 1611(b)(2), because MOD did not "show that the funds will be 'used in connection with a military activity'" and that the petitioner could not collaterally attack respondent's default judgment.

The U.S. brief argued that "the court of appeals erred in its resolution" of the remaining issue, however, stating:

In holding that petitioner's judgment against Cubic is subject to attachment, the court relied on a provision of the FSIA, 28 U.S.C. 1610(b)(2), that was not relied upon by respondent in the court of appeals and that is at least presumptively inapplicable to property of a foreign state's defense ministry. We therefore suggest that the Court vacate the judgment of the court of appeals and remand the case to that court for further consideration. . . .

Excerpts below provide the U.S. analysis concerning the proper application of 28 U.S.C. § 1610(b) (most footnotes omit-

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ted). The full text of the brief is available at [www.usdoj.gov/osg/briefs/2005/2pet/6invt/toc3index.html](http://www.usdoj.gov/osg/briefs/2005/2pet/6invt/toc3index.html).

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### A. The Court Of Appeals Erred In Its Analysis Of The Appropriateness Of Attachment Under 28 U.S.C. 1610(b)(2)

The FSIA contains separate provisions addressing attachment of the property of a foreign state (28 U.S.C. 1610(a)) and attachment of the property of a foreign state's agencies and instrumentalities (28 U.S.C. 1610(b)). The distinction is undeniably important. The FSIA largely preserves the historic rule that the property of a foreign state is immune from attachment, relaxing that rule only if the property is "used for a commercial activity in the United States" and other specified conditions are met. See 28 U.S.C. 1610(a). The FSIA allows greater latitude for attachment, however, in the case of the property of a foreign state's agencies and instrumentalities. Most significantly, it eliminates the requirement that the property itself be "used for a commercial activity in the United States." See 28 U.S.C. 1610(b).

The FSIA's distinction recognizes that a foreign state, which typically owns and utilizes property for core governmental purposes, is entitled to greater protection from attachment than its agencies or instrumentalities, which are more likely to be commercial entities that participate in the market place as equals with non-sovereign commercial entities. See *Republic of Congo*, 309 F.3d at 253. Execution against a foreign state's property is a more significant affront to the state's sovereignty than either the adjudication of a controversy involving the foreign state or execution against the property of a state's agencies or instrumentalities. See *id.* at 256; see also H.R. Rep. No. 1487, *supra*, at 27 ("the enforcement [of] judgments against foreign state property remains a somewhat controversial subject").

Petitioner contends that it is a core component of the Iranian government and therefore is subject only to the limited exceptions to attachment set out in Section 1610(a), not a separate "agency or instrumentality" that is subject to the broader exceptions set out in

Section 1610(b). . . . There is considerable force to petitioner's contention.

1. The threshold question here is whether the Cubic judgment, which is payable to petitioner—Iran's Ministry of Defense—is property of an Iranian "agency or instrumentality." The answer to that question depends on the FSIA's definitions of "foreign state" and "agency or instrumentality," see 28 U.S.C. 1603, and the relationship between Iran and its Ministry of Defense.

The FSIA defines the term "foreign state" by inclusion. See 28 U.S.C. 1603(a). Section 1603(a) provides that:

A "foreign state", except as used in section 1608 of this title [addressing service of process], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined by subsection (b).

28 U.S.C. 1603(a). Under that definition, the term "foreign state," as used in the FSIA's attachment provisions, necessarily includes a foreign state's ministry of defense. A defense ministry, which coordinates a nation's military operations, engages in a quintessential core sovereign function and is presumptively inseparable from the foreign state itself. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-153 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995).

Iran's Ministry of Defense, like its Ministry of Foreign Affairs, is part of the Iranian "foreign state." See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-235 (D.C. Cir. 2003) (holding that the Iranian Ministry of Foreign Affairs was to be "treated as the state of Iran itself rather than as its agent" because "[t]he conduct of foreign affairs is an important and 'indispensable' governmental function") (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)), *cert. denied*, 542 U.S. 915 (2004). Petitioner is therefore subject to the limited exceptions to immunity from attachment set out in Section 1610(a).

The question remains, however, whether petitioner is also subject to exceptions that pertain only to an "agency or instrumentality" of a foreign state. The FSIA defines an "agency or instru-



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mentality” restrictively. See 28 U.S.C. 1603(b). Section 1603(b) states in relevant part:

An “agency or instrumentality of a foreign state means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.

28 U.S.C. 1603(b). See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003). That definition makes clear that, for purposes of the FSIA, a foreign governmental entity cannot qualify as an “agency or instrumentality” unless it is a “separate legal person.” 28 U.S.C. 1603(b)(1).

The FSIA’s definition of “agency or instrumentality” reflects the understanding that, over the last century, “governments throughout the world have established separately constituted legal entities to perform a variety of tasks.” *Bancec*, 462 U.S. at 624. Such an entity typically does not engage in core governmental functions, but instead is “run as a distinct economic enterprise.” *Ibid*. Consequently, an instrumentality is able to operate with “a greater degree of flexibility and independence from close political control” than entities that are not separate from the state. *Id.* at 624-625.

It would be extraordinary for a foreign state to constitute its ministry of defense as a “separate legal person,” 28 U.S.C. 1603(b)(1), with “independence from close political control,” *Bancec*, 462 U.S. at 624. A foreign state’s organization of its defense ministry as a “separate” entity would, by definition, provide the foreign state with diminished control over a core sovereign function. In addition, a foreign state’s constitution of its ministry of defense as a “separate legal person” would subject the ministry to diminished immunity from suit and attachment of its property in foreign countries in which it may have a presence. Petitioner’s protestation that the court of appeals erred in treating it as an “agency or instrumentality” would appear, accordingly, to be justified, and the court’s ruling that petitioner is subject to the exceptions to im-



munity from attachment in Section 1610(b) would appear, correspondingly, to be incorrect.<sup>7</sup>

2. The court of appeals' disposition is difficult to square not only with the very nature of a foreign state's defense ministry, as just explained, but also with the course of proceedings in the court of appeals. The district court did not consider whether the attachment was authorized by the exception to immunity in either 28 U.S.C. 1610(a)(7) or 28 U.S.C. 1610(b)(2), because it held that petitioner had waived its immunity from attachment by submitting to arbitration and then seeking confirmation of the arbitration award. . . .

Given the way the parties presented the case on appeal, it is puzzling that the court of appeals failed to consider the applicability of Section 1610(a)(7), which respondent had expressly identified as an alternative ground for affirmance, and instead proceeded to hold that the property is subject to attachment under Section 1610(b)(2), on which respondent had not relied as an alternative ground for affirmance. The court did so, moreover, without even advertng to the critical antecedent question of whether petitioner falls within the FSIA's definition of an "agency or instrumentality" covered by Section 1610(b)(2). Perhaps because the parties had not addressed the applicability of Section 1610(b)(2) as an independent basis for the attachment, the court overlooked that critical distinguishing feature of Section 1610(b)(2).

Petitioner, however, then failed to avail itself fully of an opportunity to correct those errors. . . .

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<sup>7</sup> The court of appeals held that the Cubic judgment was subject to attachment under Section 1610(b) because petitioner's predecessor had engaged in commercial activity in the United States. . . . If petitioner is not an "agency or instrumentality," the Cubic judgment would be subject to attachment only if it satisfied the requirement in Section 1610(a) that the attached property be "used for a commercial activity." 28 U.S.C. 1610(a). As the district court observed, that would be a "thornier" basis for attachment. . . . Resolution of that question would require a determination whether merely obtaining a money judgment qualifies as "use[] for a commercial activity," 28 U.S.C. 1610(a), where the military goods to be acquired by petitioner pursuant to the contract on which the judgment was based were not themselves to be used for commercial purposes. See 28 U.S.C. 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of \* \* \* [the] act.>").

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It is regrettable that petitioner did not present in its rehearing petition the argument it now presents to this Court—viz., that Section 1610(b)(2) is altogether inapplicable because petitioner is not a mere agency or instrumentality of the Iranian government. The court of appeals might well have revised its decision in response to such a petition. That prospect would have been particularly likely had petitioner coupled that argument with the point (which it did make in its rehearing petition) that respondent did not even rely on Section 1610(b)(2) in the court of appeals, and if petitioner had further explained that it is exceedingly unlikely that a foreign state's ministry of defense would be a mere agency or instrumentality, possessing a legal status that is separate from the state itself. Indeed, the court of appeals itself concluded elsewhere in its opinion, in holding that the presumption of juridically separate status of an agency or instrumentality had been overcome under *Bancec*, that petitioner "is a central organ of the Iranian government under direct control of the government."

Still, the fact remains that the court of appeals does appear to have erred, on both procedural and substantive grounds, in holding that Section 1610(b)(2) rendered the property at issue here subject to attachment. And petitioner should not be deemed to have forfeited any objections to that ruling by not raising them, or arguing them more fully, in its rehearing petition. Respondent has not suggested otherwise.

### B. The Court Should Grant, Vacate, And Remand For Further Consideration Of Whether Attachment Is Appropriate Under 28 U.S.C. 1610(b)(2)

The court of appeals' decision is of concern to the United States because of the effect it may have on the attachment of the assets of central organs of foreign governments, or on the service of process on such entities under Section 1608, which sets forth different rules for agencies and instrumentalities. See *Transaero, supra*. The United States is also concerned because of the possibility of reciprocal treatment in foreign courts of the assets held or used by this Nation's Departments of Defense and State. And more generally, because of the sensitivity of questions concerning the immunity of foreign states and their property, the United States has an interest in ensuring that courts in the United States are especially careful in

their application of the FSIA, that they afford foreign states full procedural protections in the adjudication of claims of immunity, and that the courts satisfy themselves that the prerequisites for the exercise of jurisdiction over foreign states and attachment of their property are present before they exercise that judicial power. Finally, the Ninth Circuit's ruling—even though rendered without express analysis of whether petitioner is an "agency or instrumentality" of the Iranian government—is in considerable tension with the D.C. Circuit's holding in *Transaero* that a foreign state's armed forces are categorically to be regarded as inseparable from the foreign state itself, not as an agency or instrumentality thereof. *See* 30 F.3d at 151-153.

At the same time, plenary review is not required at the present time. Contrary to petitioner's assertion, we do not perceive a pattern of "analytic confusion" respecting Section 1610(a) and (b) in the courts of appeals. . . .

Under these circumstances, it would be appropriate for the Court to grant the petition as to Question 1 in the certiorari petition, vacate the judgment of the court of appeals, and remand the case to that court for consideration in the first instance of whether respondent adequately raised the question of the applicability of Section 1610(b)(2) in the court of appeals and, if so, whether petitioner is an "agency or instrumentality" of Iran whose property is subject to attachment under that Section. In the alternative, the Court could vacate the judgment of the court of appeals and remand to that court for further consideration in light of the position of the United States on that question in this brief. . . .

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**c. Consular bank accounts**

In *Copelco Capital v. Brazilian Consulate General*, C 98-1357 VRW (D.C.N.D. Cal. 2005), Copelco sought an order from the district court allowing it to levy upon the assets of the Brazilian Consulate General to enforce a judgment against the consulate for breach of contract arising from the lease of a copy machine. The United States filed a Statement of Interest in the case, arguing that the attachment of consular property to

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satisfy a civil judgment would violate the obligations of the United States under international law and that the Foreign Sovereign Immunities Act precludes execution upon the consulate's property to satisfy a civil judgment.

In its unpublished order of June 8, 2005, dismissing the claim, the district court did not address the FSIA issues. Excerpts follow from the U.S. Statement of Interest on the U.S. position that the FSIA does not allow attachment of the consulate's property (most footnotes deleted). The full text of the Statement of Interest is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). See also C.1. below for discussion of consular immunity in the case.

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. . . As a preliminary matter, the FSIA is the exclusive source of subject matter jurisdiction over all suits against foreign states or their instrumentalities. . . . The jurisdictional provisions of the FSIA waiving the ordinarily applicable immunity of foreign sovereigns, however, are explicitly made subject to treaty obligations that existed at the time of the FSIA's enactment. . . . Thus, the FSIA cannot be read to diminish or relieve the United States' obligations under the Vienna Convention on Consular Relations, which entered into force in 1963, long before the FSIA's 1976 enactment. . . .

In any event, even under the provisions of the FSIA that apply in the absence of any applicable treaty, attachment of the Consulate's property is forbidden. Section 1609 of the FSIA provides that "the property in the United States of a foreign state shall be immune from attachment, arrest or execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. 1609. Section 1610(a) of the FSIA sets forth certain exceptions to Section 1609 immunity where the foreign state's property is "used for a commercial activity in the United States." 28 U.S.C. 1610(a). Section 1610(b) provides certain further exceptions from the general immunity from attachment or execution for the property of "agencies or instrumentalities" of a foreign state where the judgment is entered against such agency or instrumentality. These exceptions are

generally considered to be broader than the foreign state exceptions contained in Section 1610(a). . . .

Under the prevailing case law, the Consulate . . . should be considered part of the foreign state itself, not an agency or instrumentality of it and, moreover, bank accounts used in furtherance of governmental activities of the Consulate do not constitute property used for commercial activity in the United States. . . .

As a general matter, when attempting to determine whether a particular entity is to be treated as a foreign state or as an agency or instrumentality of a foreign state for purposes of the various provisions of the FSIA which draw distinctions between the two, courts rely on a categorical approach which focuses on whether “the core functions of the foreign entity are predominantly governmental or commercial.” *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-52 (D.C. Cir. 1994); accord *Compangie Noga D’Importation et D’Exportation, S.A. v. Russian Federation*, 361 F.3d 676, 687 (2d Cir. 2004) (surveying cases); *Magness v. Russian Federation*, 247 F.3d 609, 613 n.7 (5th Cir. 2001) (whether an entity is an “‘agency or instrumentality’ of a foreign state . . . depends upon the nature of its core functions—governmental vs. commercial—and whether the entity is treated as a separate legal entity under the laws of the foreign state”).

Under this “core functions” test, the conduct of foreign affairs is an “important and ‘indispensable’ governmental function.” *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003), cert. denied, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2836 (2004) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). Foreign consulates in the United States perform important roles in the conduct of a foreign nation’s foreign affairs in this country, including protecting and providing services to citizens of the sending state and furthering cultural and economic relations. Just as the court found in *Gray* that it is “hard to imagine a purer embodiment of a foreign state than that state’s permanent mission to the United Nations,” so too a foreign state’s consular missions should properly be deemed part of the embodiment of the foreign state itself. Thus, contrary to Copelco’s argument, Section 1610(a), which applies to foreign states, and not Section 1610(b), which applies to agencies and instrumentalities of

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foreign states, is the applicable section when determining the availability of the Consulate's assets for attachment.

Property of a foreign state is immune from attachment and execution pursuant to Section 1610(a) unless it is "used for commercial activity in the United States." 28 U.S.C. § 1610(a). A bank account used to support consular activities in the United States should not be deemed to constitute property "used for a commercial activity in the United States" given the consulate's core governmental functions. Thus, in *LETCO* [659 F. Supp. 606 (D.D.C. 1987)], the Court agreed that no FSIA exception permitted execution on the Liberian Embassy's bank account as the activity for which the funds were used "undoubtedly is of a public or governmental nature because only a government entity may use funds to perform the functions unique to an embassy." 659 F. Supp. at 610. Thus, accounts not used to support "a regular course of commercial conduct," *see* 28 U.S.C. § 1603(d), but rather to support diplomatic and/or consular activities, are not subject to attachment under 28 U.S.C. § 1610(a).

The *LETCO* Court recognized that some portion of the bank accounts might be construed as being used for activities such as purchasing goods or services from private entities which would be considered "commercial" for purposes of jurisdiction on the merits of the claim. *Id.* The Court held, however, that even if a portion of a bank account is used for such activities it would still be immune from attachment. *Id.* The Court reasoned that a contrary result would force a diplomatic mission to "undergo a severe hardship if a civil judgment creditor were permitted to freeze bank accounts used for purposes of a diplomatic mission for an indefinite period of time until exhaustive discovery had taken place to determine the precise portion of the bank account used for commercial activities." *Id.*; *see also Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361, 370 (5th Cir.) ("under the FSIA, foreign property retains its immunity protection where its commercial uses, considered holistically and in context, are bona fide exceptions to its otherwise noncommercial use."), *clarified on reh'g on other grounds*, 389 F.3d 503 (5th Cir. 2004), *cert. denied*, \_\_\_ U.S. \_\_\_, 2005 WL 275256 (April 4, 2005); *DeLetelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984) ("Congress intended the 'essential nature' of given behavior to determine its status

for purposes of the commercial activities exception, and gave the courts a ‘great deal of latitude’ to decide this issue. . . . The legislative history makes clear that courts should not deem activity “commercial” as a whole simply because certain aspects of it are commercial”) (citation omitted); *but see Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980) (finding bank account of foreign nation’s embassy could be executed upon to satisfy judgment pursuant to FSIA because foreign state waived immunity from attachment and some funds were used for commercial activity).<sup>5</sup>

Even if the property sought to be levied upon by Copelco is deemed to be used for a commercial activity, property of a foreign state remains immune from attachment and execution unless one of several further enumerated criteria are met. *See* 28 U.S.C. §1610(a)(1)-(6). None of these further circumstances that must be present in order to properly invoke one of the FSIA’s exceptions to the general rule against attachment or execution is applicable to this case. Copelco attempts to invoke only the first of these exceptions, that the Consulate has “waived its immunity from attachment in aid of execution or execution either explicitly or by implication. . . .” 28 U.S.C. § 1610(a)(1). Copelco’s argument is based on the Court’s earlier merits determination that the Consulate waived its sovereign immunity from jurisdiction by agreeing to a contract, namely, the finance agreement, that specifically stated that it was governed by the laws of the United States. A waiver of immunity from jurisdiction, however, does not constitute a waiver of immunity from execution. *See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1217 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3498 (Feb. 11, 2005);<sup>7</sup> *see also DeLetelier*, 748 F.2d at 798-99 (noting that, in enacting FSIA, Con-

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<sup>5</sup> The United States was not a party to the *Birch* case nor did it submit its views on the proper construction of the FSIA or diplomatic or consular immunities.

<sup>7</sup> In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran*, it appears that the Court of Appeals assumed, because the judgment creditor conceded, that the Ministry of Defense was an “agency or instrumentality” of Iran. 385 F.3d at 1218 n.13. The Court recognized,



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gress did not intend “to reverse completely the historical and international antipathy to executing against a foreign state’s property even in cases where a judgment could be had on the merits”).

Because no provision of the FSIA allows departure from the general principle that “the property in the United States of a foreign state shall be immune from attachment, arrest or execution,” 28 U.S.C. § 1609, Copelco cannot succeed in its efforts to attach the assets of the Brazilian Consulate.

### B. HEAD OF STATE IMMUNITY

#### 1. *John Doe I. v. Roman Catholic Diocese of Galveston-Houston*

On December 22, 2005, the U.S. District Court for the Southern District of Texas granted a motion to dismiss claims against Pope Benedict because of his status as head of state of the Holy See. *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005). In doing so, the court stated:

In this case, the United States, through its Suggestion of Immunity and letter from the Department of State Legal Adviser, has explicitly requested that Cardinal Ratzinger, now Pope Benedict XVI and the head of the Holy See, be dismissed from this lawsuit on the basis of head-of-state immunity. Judicial review of this determination is not appropriate.

\* \* \* \*

. . . The principles underlying head-of-state immunity apply even if the foreign sovereign had a different status at the time of the alleged acts or the time the lawsuit is filed. . . .

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however, that under 28 U.S.C. § 1603(a), the Ministry of Defense “also qualified as a ‘foreign state’ for purposes of the FSIA.” *Id.* The United States believes, under the “core function” test described above, that governmental entities like the Brazilian Consulate General here are properly deemed to be the “foreign state” for purposes of determining the applicable attachment provision of the FSIA.



The U.S. Suggestion of Immunity, excerpted below (footnotes omitted), is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm), with attached letter from John B. Bellinger, III, Legal Adviser of the Department of State.

\* \* \* \*

2. The Legal Adviser of the United States Department of State has informed the Department of Justice that the Apostolic Nunciature has formally requested the Government of the United States to suggest the immunity of the Pope from this lawsuit. The Legal Adviser has further informed the Department of Justice that the “Department of State recognizes and allows the immunity of Pope Benedict XVI from this suit.” Letter from John B. Bellinger III to Peter D. Keisler, dated August 2, 2005 (copy attached as Exhibit 1).

3. The doctrine of head of state immunity is applied in the United States as a matter of customary international law and an incident of the Executive Branch’s authority in the field of foreign affairs. Unlike sovereign and diplomatic immunity, head of state immunity has not been codified in U.S. law either by statute or by treaty. As a matter of U.S. law, the doctrine is rooted in the Supreme Court’s decision in *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812). Although this case held merely that an armed ship of a friendly state was exempt from U.S. jurisdiction, the decision “came to be regarded as extending virtually absolute immunity to foreign sovereigns.” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Over time, the absolute immunity of the state itself was diminished through the widespread acceptance by states of the restrictive theory of sovereign immunity, a theory reflected in the passage in 1976 of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.* Nevertheless, U.S. courts have held that limitations on immunity contained in the FSIA do not apply to heads of state. As the Seventh Circuit recently explained in *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004):

The FSIA does not . . . address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders. The FSIA defines a foreign state to include a politi-

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cal subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch. (citations and footnotes omitted).

Thus, under customary international law and pursuant to this Suggestion of Immunity, Pope Benedict XVI, as the head of a foreign state, is immune from the Court's jurisdiction in this case. . . .

4. The Supreme Court of the United States has mandated that the courts of the United States are bound by suggestions of immunity, such as this one, submitted by the Executive Branch. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945); *Ex parte Peru*, 318 U.S. 578, 588-89 (1943). . . .

5. The courts of the United States have heeded the Supreme Court's direction regarding the binding nature of suggestions of immunity submitted by the Executive Branch. . . .

6. As the Fifth Circuit has explained, judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. [*Spacil v. Crowe*], 489 F.2d at 619. First, as the Fifth Circuit explained in *Spacil*, "[s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." *Id.* (citing *United States v. Lee*, 106 U.S. 196, 209 (1882)); *see also Ex parte Peru*, 318 U.S. at 588. Second, the Executive Branch possesses substantial institutional resources to pursue and extensive experience to conduct the country's foreign affairs. *See Spacil*, 489 F.2d at 619. By comparison, "the judiciary is particularly ill-equipped to second-guess" the Executive Branch's determinations affecting the country's interests. *Id.* Finally, and "[p]erhaps most importantly, in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.*

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## **2. *EAW Group v. Gambia***

In a Statement of Interest filed in *EAW Group, Inc. v. Gambia*, Civ. Action No. 1:02CV-2425(GK)(AK)(D.D.C.), involving payment on a contract for lobbying services, the United States took the position that head of state immunity was not implicated because President Yahya Jammeh was not a party to the litigation. At the time of the Statement of Interest, the issue before the court was a motion by Gambia to quash a notice for the deposition of President Jammeh. Excerpts below from the Statement of Interest set forth the public policy arguments for refraining from seeking such a deposition unless absolutely necessary and note that President Jammah would have immunity from service of process, an issue the United States would like to address if such action were contemplated. The full text of the statement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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In considering the impact of plaintiff's efforts to seek the deposition of President Jammeh, the Court should take into consideration the interests of the United States. Discovery in U.S. courts involving the head of state of a friendly foreign state is rare and implicates the foreign policy interests of the United States. Because such cases are also rare in other countries, U.S. practice may well influence how foreign courts handle this issue in the future. In particular, foreign courts confronted with a request to compel discovery from the U.S. President could apply reciprocally the standards used by U.S. courts.

The United States is frequently a party to civil suits in foreign courts. If we were to confront a request to depose our President in such a case, we would hope the court would not even consider the request, if at all, unless there was a strong showing of necessity and materiality that was, at a minimum, at least as strong as a U.S. court would require before allowing personal discovery against such a high-ranking U.S. official. . . .

Therefore, the United States believes that U.S. Courts should not consider the need for deposition testimony from a foreign head

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of state in the absence of a strong showing of a demonstrated need for testimony concerning material facts in the unique personal knowledge of that individual. *Cf. Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 546 (1987) (enjoining U.S. courts to “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position” and to “demonstrate due respect . . . for any sovereign interest expressed by a foreign state.”).

3. The caselaw regarding requests for testimony from senior officials in the Executive Branch is instructive. Courts, including the D.C. Circuit, universally recognize the rule that, absent a showing of extraordinary circumstances or special need, the head of a federal agency may not be required to appear and testify at an oral deposition. . . .

The principle is based on the pragmatic consideration that high government officials would be paralyzed from carrying out their duties if they were subject to being haled into court in every civil action against their agency:

[P]ublic policy requires that the time and energies of public officials be conserved for the public’s business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits on private litigants’ access to responsible government officials as sources of routine pre-trial discovery would result in a severe disruption of the government’s primary function.

*Community Fed. Sav. & Loan Ass’n*, 96 F.R.D. at 621; *see also Sykes*, 90 F.R.D. at 78; *Capitol Vending Co. v. Baker*, 36 F.R.D. 45, 46 (D.D.C. 1964)

4. This Circuit has recognized that “[p]rinciples of comity dictate that we accord the same respect to foreign officials as we do to our own,” since foreign ministers “are the equivalent of cabinet-level officials” in the United States. *In Re Minister Papandreou*, 139 F.3d at 254. *Cf. H.R. Rep. No. 94-1487* at 12, 23 (legislative history of the Foreign Sovereign Immunities Act, 28 U.S.C.

§§ 1330; 1602-1611). In light of this unbroken precedent against routinely deposing high government officials, foreign and domestic, (much less heads of state), the court should not even consider the need to take discovery from President Jammeh unless plaintiff can make a clear showing either that the discovery is “essential to prevent prejudice or injustice to the party who would require it,” *Wirtz v. Local 30, Int’l Union of Operating Eng’rs*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963), or that “extraordinary circumstances” exist, *Community Fed. Sav. & Loan*, 96 F.R.D. at 621. Certainly, plaintiff cannot make that showing now, before having deposed any other Gambian official.

5. Even if, after the completion of other depositions, the Court determines that further information is needed from President Jammeh, the Court, in fashioning a discovery plan, should require plaintiff to use all available discovery tools to minimize any intrusion on the dignity of President Jammeh’s office, and on the performance of his official duties. The Federal Rules of Civil Procedure offer plaintiff several alternative means to obtain the information short of the intrusive, and extraordinary step of deposing the head of state of a foreign government. *In Re Papandreou*, *supra* 139 F.3d at 254. Any party seeking the deposition testimony of a high level official under these circumstances must show that the information it seeks cannot be obtained through less burdensome means, such as through interrogatories or requests for admissions. *See Kyle Engineering*, 600 F.2d at 231; *United States v. Miracle Recreation Equipment Co.*, 118 F.R.D. 100, 105 (S.D. Iowa 1987); *Sykes*, 90 F.R.D. at 78; *Wirtz*, 34 F.R.D. at 14; *Capitol Vending*, 36 F.R.D. at 46.

6. The United States takes no position on whether the testimony of President Jammeh is, in fact, needed in these proceedings, and, if so, when, in what form, or on which issues. Nor does the United States take any position on what steps would be appropriate for the Court to take if it determines that additional information from President Jammeh was relevant and discoverable, but not forthcoming.

7. President Jammeh, as a head of state, would ordinarily have immunity from legal process in the United States. The Court, however, does not need to reach the issue of head of state immunity. As noted, the issue is not presented and plaintiff has not exhausted dis-

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covery alternatives that may be available. If the court concludes that discovery is needed from President Jammeh, it has available tools to address lack of cooperation through means other than asserting jurisdiction over him. If the issue of President Jammeh's personal immunity becomes ripe for consideration, the United States would like an opportunity to submit its views on head of state immunity, which would be binding on the court. See *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004).

### 3. *Doe v. Israel*

On November 10, 2005, the U.S. District Court for the District of Columbia granted motions to dismiss claims brought by anonymous Palestinians living in Israel, the West Bank, or the United States against the state of Israel, Prime Minister Ariel Sharon, and other Israeli government officials, and Israeli military entities ("Israeli defendants") and also against "settler defendants." *Doe v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005). As summarized by the court, the complaint alleged that "plaintiffs, or their loved ones, have been personally and financially injured by the actions of the Israeli defendants—and those acting under their command or policies—regarding settlement activities in the West Bank."

The United States had participated in the case by filing a Suggestion of Immunity for Prime Minister Ariel Sharon. See *Digest* 2003 at 571. In granting dismissal for Prime Minister Sharon on head of state immunity grounds, the court stated (internal citations omitted):

When the Executive Branch concludes that a recognized leader of a foreign sovereign should be immune from the jurisdiction of American courts, that conclusion is determinative. The decision to grant or deny immunity to the leader of a foreign sovereign undoubtedly has significant implications for this country's foreign policy efforts. "Just as the FSIA is the Legislative Branch's determination that a nation should be immune from suit in the courts of this country, the immunity of foreign leaders remains the province of the Executive Branch." When, as here, the

Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases. . . . Defendant Sharon is the recognized head of state for Israel, and based on the June 11, 2003 Suggestion of Immunity submitted to this Court, he is entitled to immunity under the head-of-state doctrine. Plaintiffs disjointedly argue that he waived his head of state immunity more than twenty years ago, before taking office, through the filing of a defamation claim in a United States court. . . . Not only is this argument unsupported by the case law, but it is entirely irrelevant—the filing of a Suggestion of Immunity ends the court’s inquiry.

The court also held that service of process on the Israeli governmental entities was inadequate under § 1608(a) of the Foreign Sovereign Immunities Act (“FSIA”) and that all of the Israeli defendants, including individual Israeli officials, were in any event immune under the FSIA. Furthermore, the court concluded that “[e]ven were there personal jurisdiction and subject matter jurisdiction under FSIA, this case nonetheless could not proceed because it is replete with nonjusticiable political questions. Moreover, the Court would abstain from exercising jurisdiction because of prudential concerns embodied in the act of state doctrine.”

## **C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES**

### **1. *Copelco Capital, Inc. v. Brazilian Consulate General***

In *Copelco Capital v. Brazilian Consulate General*, C 98-1357 VRW (D.C.N.D. Cal. 2005), discussed in A.6.c. *supra*, the court denied Copelco’s motion to attach the Brazilian consulate’s bank account to enforce a judgment against the consulate for breach of contract. *Copelco Capital v. Brazilian Consulate General*, No C 98-1357 VRW (N.D.Cal., June 8, 2005). In doing so, the court acknowledged the arguments set forth in the U.S. Statement of Interest in the case that

such attachment would violate U.S. obligations under the Vienna Convention on Consular Relations (“VCCR”) and, on the basis of reciprocity, could have severely adverse effects on the ability of the United States to conduct its consular and diplomatic activities abroad. The United States agreed with the Brazilian consulate that “interference by the United States—including by courts of the United States—with bank accounts or other property of foreign nations used for consular activities interferes with the United States’ treaty obligations under the Vienna Convention,” explaining:

[The VCCR] obligates the United States to ensure that consular missions are accorded the facilities they require for the performance of their consular functions. Specifically, Article 28 of the Vienna Convention provides: “The receiving State shall accord full facilities for the performance of the functions of the consular post.” As the preamble to the treaty states, the purpose of the privileges and immunities accorded consular missions is to “assure the efficient performance of the functions by consular posts on behalf of their respective States.” As a practical matter, a consular mission cannot perform its consular functions if its bank accounts or other property are frozen or otherwise subject to interference. *See, e.g., Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.6 (5th Cir. 2002). . . . Such property, therefore, is protected by consular immunity.

In its order, excerpted below, the court stated that it “doubt[ed] that consulate bank account immunity necessarily flows from the VCCR” and it found cases from the Northern District relied on by the consulate and the United States distinguishable. It concluded, however, that “[n]onetheless, the court is constrained to stay its hand in light of the United States’ position.” The full text of the court’s unpublished order is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*



The court cannot improve on the words of Chief Justice Stone, speaking for the Court:

It is a guiding principle in determining whether a court [should grant a suggestion of immunity], that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. It is therefore not for the courts to deny an immunity which our government has seen fit to allow \* \* \*. *Republic of Mexico v. Hoffman*, 324 US 30, 35 (1945) (citation and internal quotation marks omitted).

Aside from the desire not to embarrass the executive branch, “the determination to grant (or not grant) immunity can have significant implications for this country’s relationship with other nations.” *Wei Ye v. Swain*, 383 F3d 620, 627 (7th Cir 2004). Indeed, [Department of Justice attorney Rupa] Bhattacharyya spoke in depth regarding these implications. In such a case, “[a] court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to [provide immunity].” . . .

Moreover, this deference is especially warranted in light of the fact that Copelco has not exhausted other avenues of potential remedies; it has not attempted to recover in the courts of Brazil. Refusing to accept two signatories’ joint interpretation of the VCCR is not something this court should embark upon lightly even in light of the strong equities evident here. Copelco can resort to other means in attempting to recover on its judgment. Consulate’s counsel has represented that this is the route by which claims against the government of Brazil are normally asserted. Further, Consulate’s counsel has represented that Brazil understands its duty to honor its contractual obligations. . . . Still, Consulate’s refusal to make timely payments has almost quadrupled the amount due Copelco. The longer the debt goes unpaid, the greater the ultimate reckoning will be. Furthermore, Consulate’s resting on the VCCR is not solid ground, but a quicksand. Consulates need copiers and lots of other things to perform their mission; many of which must be acquired in

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the host country. If suppliers in those countries cannot expect to be paid and in the event of non-payment not have the normal remedies available in commercial transactions, then suppliers will simply not furnish the needed goods and services, except perhaps for cash on the barrel head. . . .

\* \* \* \*

### 2. London Congestion Charge

In February 2003 Transport for London implemented the Greater London (Central Zone) Congestion Charging Order 2001 in an effort to reduce vehicular traffic in central London and raise revenues for public transportation projects. As a result, a fixed daily charge, originally of £ 5 and later increased to £ 8, is imposed on any use of a motor vehicle within the charging zone between the hours of 7:00 am and 6:30 pm on a weekday. The Embassy of the United States is located within the charging zone. The United States has taken the position that the congestion charge is a tax from which U.S. diplomatic, consular, and military vehicles are exempt under international law. In a diplomatic note of July 11, 2005, the U.S. Embassy informed the UK Foreign and Commonwealth Office ("FCO") that it would no longer pay the charge for those vehicles. Excerpts from the note below set forth the legal position of the United States. The full text of the note is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

As the FCO is aware, the Embassy takes the view that Transport for London's Congestion Charge is a tax that, under international law, should not be imposed on the United States Government, its diplomatic and consular agents, or its military force.

With respect to U.S. diplomatic personnel, Article 34 of the Vienna Convention on Diplomatic Relations (VCDR) provides that, subject to specific exceptions, "a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal." The specific exception the FCO has relied upon in discus-

sions with the United States on the Congestion Charge is Article 34(e), which recognizes a State's right to impose, and a diplomat's duty to pay, "charges levied for specific services rendered."

This reliance is misplaced because no specific service is tendered in exchange for payment; the revenue raised is used to provide services to those other than those paying the charge; and the charge bears no reasonable relationship to the cost of the service supposedly rendered to the payer. Like the tax on petrol from which diplomats and diplomatic missions are exempt, the Congestion Charge is a tax imposed to discourage driving and to encourage the use of public transport.

Even if there were some ambiguity as to the nature of the Congestion Charge as a tax, that ambiguity should be resolved in favor of the exemption the Embassy asserts. As the leading commentator on the VCDR has written, "The wording of the basic exemption contained in Article 34 is very wide. Although there are several specific exceptions to the exemption, it is probable that in cases of ambiguity, national revenue authorities and courts should in construing them lean in favour of the general exemption." (Denza, *Diplomatic Law* (2nd ed., 1998), p. 297).

Furthermore, the Congestion Charge is in tension with other duties owed to foreign missions and diplomats. Article 25 of the VCDR obliges a receiving State to "accord full facilities for the performance of the functions" of a diplomatic mission. Because the Embassy is in the area targeted by the congestion tax, the imposition of the Congestion Charge on official Embassy vehicles and the private vehicles which members of the Mission use for employment purposes interferes with performance of the Embassy's functions.

Similarly, Article 26 of the VCDR requires a receiving State to ensure freedom of movement and travel within its territory for diplomats. The imposition of the Congestion Charge, by conditioning access to the Chancery and other official destinations within the Congestion Zone, runs contrary to this principle.

Moreover, because the enforcement mechanisms under the Congestion Charging Scheme include the clamping of vehicles for which the Charge has not been paid, the use of these mechanisms against the Embassy's diplomatic vehicles is also inconsistent with Articles 22 and 31 of the VCDR. Article 22(3) guarantees that "the

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means of transport of the mission shall be immune from search, requisition, attachment or execution,” and Article 31(1) recognizes a diplomat’s “immunity from the criminal jurisdiction of the receiving State.” As then Minister of State, Foreign and Commonwealth Office, Baroness Young, explained to Parliament in a related context in 1986, “[B]ecause diplomats have immunity from criminal jurisdiction and clamping is a penal measure both in intent and in effect, it in fact contravenes the Vienna Convention.” 1986 BYIL 552.

The Embassy would further direct the FCO’s attention to FCO Note No. A028/03, in which it stated: “Transport for London have made clear that diplomatic missions could only be exempted from the scheme if the Greater London Authority was under a clear legal obligation to grant such exemption.” For all the reasons given above, the Embassy believes the existence of such a clear legal obligation is unquestionable.

Indeed, the Embassy has learned that since the date of that Note, Transport for London has apparently reached the same conclusion. In a letter of December 24, 2004, to the Swiss Embassy in London, the Enforcement Manager for Transport for London expressly acknowledged that diplomatic vehicles were exempt from the Congestion Charge. This acknowledgment does not indicate that it is based on any special aspect of the diplomatic relationship between the United Kingdom and Switzerland and the Embassy is aware of no basis for exempting the missions of other States from the Congestion Charging Scheme but denying that exemption to the United States.

Analogous arguments must prevail with respect to U.S. official consular vehicles and the privately owned vehicles of U.S. consulate personnel. Like Article 34 of the VCDR, Article 49 of the [Vienna Convention on Consular Relations of 1963] VCCR (read in conjunction with Article 71) recognizes the exemption of consular officers and employees, and family members in their households, who are not either British nationals or permanently resident in the UK, “from all dues and taxes, personal or real, national, regional or municipal,” with a few limited exceptions. Again like the VCDR, the VCCR includes an exception to the exemption for “charges levied for specific services rendered.” Article 49(1)(e). For all the rea-

sons given with respect to the VCDR, however, this exception does not extend to the Congestion Charge.

The Bilateral Convention also precludes application of this tax. Article 12(2) provides that “no tax or other similar charge of any kind (national, state, provincial, municipal, or other) shall . . . be collected from the sending State . . . in respect of the ownership, possession, or use of movable property. . . .” The imposition of the Congestion Charge obviously imposes a tax on the use of vehicles for official U.S. Government purposes.

The Embassy believes it is equally inappropriate to impose the Congestion Charge on the United States Force stationed in the United Kingdom under the North Atlantic Treaty. The NATO Status of Forces Agreement (SOFA) does not provide any basis upon which a tax of this nature may be imposed upon the U.S. Force and it has been the consistent practice of all NATO partner States not to impose taxes on the force of a sending State unless specifically authorized by that agreement.

Furthermore, Article XI, Paragraph 2 (c), of the SOFA states that “Service vehicles of a force or civilian component shall be exempt from any tax payable in respect of the use of vehicles on the roads.” In other words, the SOFA specifically provides that this type of tax may not be imposed upon the U.S. Force.

In addition, Article IX, Paragraph 6, of the SOFA states that “The receiving State shall give the most favorable consideration to requests for the grant to members of a force or of a civilian component of traveling facilities and concessions with regard to fares.” The imposition of the Congestion Charge, especially on official vehicles, is an obstruction to travel. As some exemptions and discounts have been given to various categories of vehicles operating in the Congestion Zone, the U.S. Force’s request for an exemption is clearly not being given the most favorable consideration.

Imposition of the Congestion Charge on the U.S. Force would also appear to be inconsistent with UK domestic law. Under section 184 of the Army Act 1955, “duties or tolls . . . for passing over any road or bridge in the United Kingdom . . . shall not be payable in respect of (a) members of the regular forces on duty; (b) vehicles in military service.” Section 184 has been extended to visiting forces by the Visiting Forces and International Headquarters (Application

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of Law) Order, 1999, Schedule 6, wherein it is stated that the reference to “regular forces” shall include members of a visiting force or international headquarters. There is a similar extension to vehicles in the service of such visiting forces. Although Transport for London acknowledges that certain tactical military vehicles are exempt from the charge, there is no apparent basis in law for a distinction between types of military vehicles or between the military vehicles of the United States and those of the United Kingdom.

Thus, the Embassy has concluded that the Congestion Charge is a tax that cannot be lawfully imposed on the U.S. Government, its diplomatic and consular personnel, or its military force. Although to date the Embassy and its diplomatic personnel have been paying the Congestion Charge, the Embassy must inform the FCO that the Embassy and its staff will cease this practice as of July 12, 2005. The U.S. Force has not paid this tax on the use of its official vehicles in the past and will not in the future.

The Embassy asks that the FCO confirm to Transport for London that the U.S. Government, its diplomatic and consular personnel, and its military force are exempt from the Congestion Charging Scheme and that no penalties or enforcement measures for failure to comply with that Scheme can be imposed upon them.

\* \* \* \*

In a diplomatic note dated August 5, the Foreign and Commonwealth Office reaffirmed its view that there are no legal grounds for exempting diplomatic missions from payment of the congestion charge. The FCO agreed, however, that under the VCDR enforcement measures could not be taken against diplomatic missions for non-payment of the charge. In a separate note dated September 2, 2005, the FCO also disagreed that the imposition of the charge on U.S. military vehicles violated any applicable legal constraints.

### D. THE ACT OF STATE DOCTRINE

Under the act of state doctrine as developed by courts in the United States, U.S. courts generally abstain from sitting in judgment on acts of a governmental character done by a for-

eign state within its own territory. Because this doctrine is often invoked in cases involving issues of immunities, several recent cases discussing act of state are addressed here.

1. ***Philippine National Bank v. U.S. District Court for the District of Hawaii***

On February 4, 2005, the U.S. Court of Appeals for the Ninth Circuit issued an opinion granting a petition for writ of mandamus to the U.S. District Court for the District of Hawaii, concluding that orders issued by the district court violated the act of state doctrine. *Philippine National Bank v. U.S. District Court for the District of Hawaii*, 397 F.3d 768 (9th Cir. 2005). Excerpts follow (footnotes omitted).

\* \* \* \*

This mandamus petition represents one more chapter in a long-running dispute over the right to the assets of the estate of former Philippine President Ferdinand E. Marcos. On one side is a class of plaintiffs who obtained a large judgment in the federal district court in Hawaii against the Marcos estate for human rights violations by the Marcos regime. The judgment included an injunction restraining the estate and its agents or aiders and abettors from transferring any of the estate's assets. On the other side is the Republic of the Philippines, which independently has sought forfeiture of the Marcos estate's assets on the ground that they were stolen by Marcos from the Philippine government and its people.

\* \* \* \*

DISCUSSION

1. *The act of state doctrine.*

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign

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powers as between themselves. *Underhill v. Hernandez*, 168 U.S. 250, 252, 42 L. Ed. 456, 18 S. Ct. 83 (1897). The act of state doctrine originally was deemed to arise from international law, but more recently has been viewed as a function of our constitutional separation of powers. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 404, 107 L. Ed. 2d 816, 110 S. Ct. 701 (1990). So viewed, the doctrine reflects “‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs.” *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964)).

The district court’s orders in issue violated this principle. In order to obtain assets from the Philippine Bank, or to hold the Bank in contempt for the transfer of those assets to the Republic, the district court necessarily (and expressly) held invalid the forfeiture judgment of the Philippine Supreme Court. We conclude that this action of the district court violated the act of state doctrine.

The class plaintiffs in the district court argue that the act of state doctrine is directed at the executive and legislative branches of foreign governments, and does not apply to judicial decisions. Although the act of state doctrine is normally inapplicable to court judgments arising from private litigation, there is no inflexible rule preventing a judgment sought by a foreign government from qualifying as an act of state. *See Liu v. Republic of China*, 892 F.2d 1419, 1433-34 & n.2 (9th Cir. 1989) (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 41 cmt. d (1965)) (“A judgment of a court may be an act of state.”). There is no question that the judgment of the Philippine Supreme Court gave effect to the public interest of the Philippine government. The forfeiture action was not a mere dispute between private parties; it was an action initiated by the Philippine government pursuant to its “statutory mandate to recover property allegedly stolen from the treasury.” *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d at 546. We have earlier characterized the collection efforts of the Republic to be governmental. *Id.* The subject matter of the forfeiture action thus qualifies for treatment as an act of state.



The class plaintiffs next argue that the act of state doctrine is inapplicable because the judgment of the Philippine Supreme Court did not concern matters within its own territory. Generally, the act of state doctrine applies to official acts of foreign sovereigns “performed within [their] own territory.” *Credit Suisse*, 130 F.3d at 1346 (internal quotations omitted). The act of the Philippine Supreme Court was not wholly external, however. Its judgment, which the district court declared invalid, was issued in the Philippines and much of its force upon the Philippine Bank arose from the fact that the Bank is a Philippine corporation. It is also arguable whether the bank accounts have a specific locus in Singapore, although they apparently were carried on the books of bank branches there. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1121-25 (5th Cir. 1985) (discussing differing theories of situs of intangibles). Even if we assume for purposes of decision that the assets were located in Singapore, we conclude that this fact does not preclude treatment of the Philippine judgment as an act of state in the extraordinary circumstances of this case. [T]he [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations.” *Tchacos Co. v. Rockwell Int’l Corp.*, 766 F.2d 1333, 1337 (9th Cir. 1985). Thus, even when an act of a foreign state affects property outside of its territory, “the considerations underlying the act of state doctrine may still be present.” *Callejo*, 764 F.2d at 1121 n.29. Because the Republic’s “interest in the enforcement of its laws does not [] end at its borders,” *id.*, the fact that the escrow funds were deposited in Singapore does not preclude the application of the act of state doctrine. The underlying governmental interest of the Republic supports treatment of the judgment as an act of state.

It is most important to keep in mind that the Republic did not simply intrude into Singapore in exercising its forfeiture jurisdiction. The presence of the assets in Singapore was a direct result of events that were the subject of our decision in *Credit Suisse*. There we upheld as an act of state a freeze order by the Swiss government, enacted in anticipation of the request of the Philippine government, to preserve the Philippine government’s claims against the very assets in issue today. *Credit Suisse*, 130 F.3d at 1346-47. Indeed, the Philippine National Bank argues that the district court’s orders vio-

lated our mandate in *Credit Suisse* “directing the district court to refrain from taking any further action” with regard to assets of the Marcos estate “held or claimed to be held by the [Swiss] Banks.” *Id.* at 1348. The district court held that our mandate did not apply to the assets once they left the hands of the Swiss banks. We need not decide the correctness of that ruling because we conclude that, in these circumstances, the Philippine forfeiture judgment is an act of state. The Swiss government did not repudiate its freeze order, and the Swiss banks did not transfer the funds in the ordinary course of business. They delivered the funds into escrow with the approval of the Swiss courts in order to permit the very adjudication of the Philippine courts that the district court considered invalid. To permit the district court to frustrate the procedure chosen by the Swiss and Philippine governments to adjudicate the entitlement of the Republic to these assets would largely nullify the effect of our decision in *Credit Suisse*. In these unusual circumstances, we do not view the choice of a Singapore locus for the escrow of funds to be fatal to the treatment of the Philippine Supreme Court’s judgment as an act of state.

\* \* \* \*

## 2. *Owens v. Sudan*

In *Owens v. Sudan*, discussed in A.4.b.(3) *supra*, the court rejected arguments by the Sudan defendants that the claims in that case, alleging involvement of Sudan in the bombings of U.S. embassies in Tanzania and Kenya, were barred by the act of state doctrine. Excerpts follow.

\* \* \* \*

Finally, the Sudan defendants maintain that the Court should dismiss the suit pursuant to the act of state and political question doctrines. Both of these arguments are unavailing.

The act of state doctrine bars a court from deciding a case “when the outcome turns upon the legality or illegality . . . of official action by a foreign sovereign performed within its own territory.” *Riggs Nat’l Corp. & Subsidiaries v. Comm’r of IRS*, 333 U.S.

App. D.C. 371, 163 F.3d 1363, 1367 (D.C. Cir. 1999); see *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 406, 107 L. Ed. 2d 816, 110 S. Ct. 701 (1990). The doctrine is founded on “the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs.” *W.S. Kirkpatrick & Co.*, 493 U.S. at 404 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964)). The FSIA does not remove the need to consider the act of state doctrine. See *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240, 2254, 159 L. Ed. 2d 1 (2004) (“The FSIA in no way affects application of the act of state doctrine.”). Courts assessing whether the act of state doctrine forecloses a given case under the FSIA have looked to three factors: (i) the degree of consensus concerning a particular area of international law, (ii) the implications of the issue for our foreign relations, and (iii) whether the government that perpetrated the challenged act is still in existence. See *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1295 (N.D. Cal. 2004) (citing *Sabbatino*, 376 U.S. at 427-28.)

These factors weigh overwhelmingly in favor of rejecting the act of state doctrine here. There are few acts that more clearly violate international law than a terrorist attack on innocent civilians. See *Dammarell*, 281 F. Supp. 2d at 192 (terrorist attacks on embassies are “clearly contrary to the precepts of humanity as recognized in both national and international law”). This case does not present a circumstance in which a change of government—in Iran or Sudan—warrants application of the act of state doctrine. Finally, uniquely in a section 1605(a)(7) case, the concern that the judiciary might be interfering with the executive’s authority over foreign relations is at its lowest point, because jurisdiction over the suit only exists if the executive has first designated the nation as a state sponsor of terrorism. See 28 U.S.C. § 1605(a)(7)(A). For these reasons, the only court to consider the application of the act of state doctrine to a section 1605(a)(7) case flatly rejected it:

While the act of state doctrine seeks to prevent courts from interfering in the foreign affairs powers of the President and the Congress, it does not prohibit Congress and the Executive from using the threat of legal action in the courts

as an instrument of foreign policy. The designation of Iraq as a terrorist state was made by the Secretary of State on behalf of the Executive Branch under an express grant of authority by Congress. For this Court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress.

*Daliberti*, 97 F. Supp. 2d at 54-55.

The Sudan defendants do not provide any reason to hold otherwise in this case. . . .

Congress was certainly aware of all of these issues, and yet concluded that suits are a necessary response to the destructive consequences of state-sponsored terror. It is not the province of this Court to second-guess this choice through application of the act of state doctrine or any other judicially-crafted principle of decision or abstention. . . .

\* \* \* \*

### 3. *Enahoro v. Abubakar*

In *Enahoro v. Abubakar*, 2005 U.S. Dist. LEXIS 27831 (N.D. Ill. 2005), the U.S. District Court for the Northern District of Illinois held that the act of state doctrine did not apply in a claim based on allegations of torture and extrajudicial killing committed at the time the defendant was a member of a ruling military junta in Nigeria. The court explained as excerpted below.

\* \* \* \*

To determine whether the act of state doctrine precludes judicial intervention in a particular controversy, the Court balances a number of policy considerations. *See Sabbatino*, 376 U.S. at 428. Two important factors include whether the international community has established a consensus regarding the activity in question, *id.*, and

whether the resolution of the case will “likely impact on international relations,” or “embarrass or hinder the executive in the realm of foreign relations.” *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir. 1985).

The “international consensus” factor strongly favors the plaintiffs. Torture and extrajudicial murder have long been condemned by international law. Indeed, they are violations of jus cogens norms, which are binding on nations even if they do not agree to them. As a result, the international consensus is strong in renouncing such actions. *See Doe I v. UNOCAL Corp.*, 395 F.3d 932, 959 (9th Cir. 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 345 (S.D.N.Y. 2003).

The second factor also weighs in favor of the plaintiffs. In *Sabbatino*, the Court said, the balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered.” 376 U.S. at 428, 84 S.Ct. at 941. In other words, judicial involvement in a particular controversy will have less effect on foreign relations where the government in question has been removed. In this case, the Nigerian military regime led in part by Abubakar has been replaced by a democratically elected government. *See Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, No. 96 C 8386, 2002 WL 319887, at \* 28 (S.D.N.Y. 2002) (declining to invoke the act of state doctrine because Nigerian military government had been replaced). Consequently, the likelihood of embarrassment for the executive branch is measurably reduced. For these reasons, the Court holds the act of state doctrine inapplicable.

\* \* \* \*

#### **4. *Doe v. Israel***

In *Doe v. Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) discussed in B.3. *supra*, the court examined the applicability of the act of state doctrine, concluding as excerpted below.

\* \* \* \*

The actions challenged by plaintiffs are classic acts of state. *See Underhill v. Hernandez*, 168 U.S. 250, 254, 18 S. Ct. 83, 42 L. Ed. 456 (1897). Tort challenges brought against foreign military officials for such alleged harms as unlawful detention during a political revolution implore the courts to “‘declare invalid’ and deny ‘legal effect to acts of a military commander representing the . . . government.’” *Abu Ali*, 350 F. Supp. 2d at 58 (quoting *W.S. Kirkpatrick*, 493 U.S. at 405). Plaintiffs do not challenge the actions of third-parties in procuring the alleged unlawful acts, *see Abu Ali*, 350 F. Supp. 2d at 58-59; *see also W.S. Kirkpatrick*, 493 U.S. at 406-07; rather, they ask this Court directly to declare that they were treated illegally by Israeli defendants on Israeli soil. Such a determination would offend notions of international comity and sovereignty. *See World Wide Minerals*, 296 F.3d at 1165-66. Indeed, “‘to permit the validity of the acts of [Israel] to be reexamined and perhaps condemned by the courts of [the United States] would very certainly imperil the amicable relations between [those] governments and vex the peace of nations.’” *Sabbatino*, 376 U.S. at 415 (quoting *Oetjen*, 246 U.S. at 303-04).

Similarly, the federal courts have long recognized that the exploitation of natural resources and land within a nation’s own borders is, by legal definition, an act of state. *See Sabbatino*, 376 U.S. at 428; *World Wide Minerals*, 296 F.3d at 1165; *Riggs Nat’l Corp. v. Comm’r of IRS*, 163 F.3d 1363, 1367, 333 U.S. App. D.C. 371 (D.C. Cir. 1999). Even if, as plaintiffs allege, the Israeli defendants have taken land or possessions for the use of Israel and its people, such actions are only possible by virtue of the fact that the Israeli defendants are vested with the powers and resources of the Israeli government. *See Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682, 701-04, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976); *see also Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073, 1079 (C.D. Cal. 1999). It is of no moment that some plaintiffs are United States citizens. *See Sabbatino*, 376 U.S. at 424-25. The acts challenged are those of the Israeli state, through individual actors carrying out the mandate of the state for its benefit.

Plaintiffs’ claims would require the Court to adjudicate sensitive issues of a political nature that would offend notions of inter-

national comity. The fact that plaintiffs have alleged *jus cogens* violations does not change things. Within our territorial borders, the law of the United States is paramount, under which the law of nations does not preempt the act of state doctrine even if the conduct at issue allegedly violates international law. *Sabbatino*, 376 U.S. at 422 (recognizing that United States courts will apply international law as part of its own law when a case presents an appropriate circumstance in which to do so, but “the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders”). . . .

\* \* \* \*

#### **Cross References**

*Cases decided on political question rather than FSIA ground,*  
**Chapter 8.B.1.a. and b.**

*Case concerning sovereign immunity and imported art works,*  
**Chapter 14.B.**





## CHAPTER 11

# Trade, Commercial Relations, Investment, and Transportation

### A. TRANSPORTATION BY AIR

#### 1. Fees Applicable to State Aircraft

In 2005 the Department of State provided the following guidance by telegram on U.S. policy concerning fees chargeable to military and other state aircraft, whether those of the United States in another country, or foreign-state aircraft in the United States.

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It is USG policy that flights of state aircraft operated in or through the airspace of another state will:

- Not be required to pay air navigation, overflight or terminal navigation fees (terminal navigation fees are air navigation fees levied for takeoff from, or final approach to an airport);
- Not be required to pay landing or parking fees or other use fees at government airports;
- Pay reasonable charges for services requested and received, whether at government or non-government airports.

This position, which is based upon the unique status of state aircraft in international law as instruments of a sovereign, is consistent with international custom and practice.

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The United States applies this policy to all military and other U.S. state aircraft. The USG does not impose such fees on foreign state aircraft visiting or transiting the United States.

The terms of relevant bilateral or multilateral agreements will govern the operation of U.S. state aircraft.

### 2. Air Service Agreements

#### a. *U.S.-EU air transport agreement*

On November 18, 2005, delegations representing the European Union and the United States successfully concluded four days of negotiations in Washington, D.C., on a comprehensive first-step air transport agreement. As described in a statement issued by U.S. Transportation Secretary Norman Y. Mineta, “[t]he agreement . . . goes beyond traditional Open-Skies agreements by applying those principles on a regional basis.” See [www.dot.gov/affairs/dot17105.htm](http://www.dot.gov/affairs/dot17105.htm). A joint statement of the two delegations, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/57152.htm](http://www.state.gov/r/pa/prs/ps/2005/57152.htm).

\* \* \* \*

The delegations negotiated the text of an agreement, which will be reviewed for final approval.

For the European Union, the agreement will require approval by the Transport Council of Ministers, consisting of the twenty-five EU Member States. In this connection, the EU delegation noted that the Council, in making a decision, will take into account the outcome of the rulemaking process recently initiated by the U.S. Department of Transportation to expand opportunities for foreign citizens to invest in and participate in the management of U.S. air carriers.

This successful round of negotiations in Washington follows over two years of formal talks, announced at the U.S.-EU Summit in June 2003 as “an historic opportunity to build upon the framework of existing agreements with the goal of opening access to markets and maximizing benefits for consumers, airlines, and communities on both sides of the Atlantic.”

\* \* \* \*

A fact sheet also issued on November 18 described the agreement as follows. The fact sheet is available at [www.state.gov/r/pa/prs/ps/2005/57148.htm](http://www.state.gov/r/pa/prs/ps/2005/57148.htm).

- The Agreement, if approved, would authorize every EU and every U.S. airline:
  - to fly between every city in the European Union and every city in the United States;
  - to operate without restrictions on the number of flights, the aircraft used, or the routes chosen, including unlimited rights to fly beyond the EU and U.S. to points in third countries;
  - to set fares freely in accordance with market demand; and to enter into cooperative arrangements with other airlines, including codesharing and leasing.
- In the Agreement, both sides underscore their fundamental commitment to the highest standards of aviation safety and security. The Agreement provides for enhanced cooperation between European and American authorities in these vital fields.
- The Agreement also envisions consultations and cooperation between the European Union and the United States in the areas of competition law and policy, government subsidies and support, environment, and consumer protection. The Agreement will establish a Joint Committee to review implementation and resolve questions as well as to develop further cooperation between the two sides.
- The Agreement could be applied as early as late October 2006, the start of the IATA Winter Traffic Season.
- The Agreement represents a first stage of opening markets and enhancing cooperation. The European Union and the United States have agreed to begin a second stage of negotiations within sixty days of application of the Agreement.

**b. Other open skies and related agreements**

During 2005 the United States concluded open skies agreements with India (Jan. 15, 2005), Maldives (May 5, 2005), Ethiopia (May 17, 2005), Paraguay (May 17, 2005), Thailand (Sept. 19, 2005), Mali (Oct. 17, 2005), Canada (*ad referendum* Nov. 1, 2005), and Bosnia-Herzegovina (Nov. 22, 2005). For further information on these agreements, see [www.state.gov/e/eb/tra/c6661.htm](http://www.state.gov/e/eb/tra/c6661.htm)

The United States and the Russian Federation also reached agreement on a major expansion of aviation rights on October 6, 2005. See [www.state.gov/r/pa/prs/ps/2005/54378.htm](http://www.state.gov/r/pa/prs/ps/2005/54378.htm).

**3. Non-U.S. Investment in U.S. Air Carriers: Actual Control**

On November 7, 2005, the Department of Transportation issued a notice of proposed rulemaking seeking comments “on a proposal to clarify policies that may be used during initial and continuing fitness reviews of U.S. carriers when citizenship is at issue.” 70 Fed. Reg. 67,389 (Nov. 7, 2005). Excerpts follow from the Federal Register notice (footnotes have been omitted). See also reference to this rulemaking process in the joint U.S.-EU statement in 2.a. *supra* and remarks by Jeffrey N. Shane, Under Secretary of Transportation for Policy on November 8, 2005, available at [www.state.gov/e/eb/rls/rm/2005/56735.htm](http://www.state.gov/e/eb/rls/rm/2005/56735.htm).

\* \* \* \*

Air carriers must have authority granted to them by the Department [of Transportation] to operate in the United States as U.S. air carriers. Under 14 CFR 204.5, certificated and commuter air carriers that undergo or propose to undergo a substantial change in operations, ownership, or management must submit certain updated fitness information to the Department. . . . During a continuing fitness review, the Department’s staff may examine the carrier’s ownership structure, and determine whether the air carrier continues to satisfy all statutory citizenship tests and continues to be under the actual control of U.S. citizens.

A citizen of the United States is defined [for these purposes] in 49 U.S.C. 40102(a)(15) as:

- (A) An individual who is a citizen of the United States;
- (B) A partnership each of whose partners is an individual who is a citizen of the United States; or
- (C) A corporation or association organized under the laws of the United States or a state, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75% of the voting interest is owned or controlled by persons that are citizens of the United States.

To be licensed, an airline that is, or is owned by, a corporation must be under the “actual control” of U.S. citizens to meet or continue to meet the citizenship standard. For many years, the standard and scope was refined through administrative case law dating back to 1940, first by the Civil Aeronautics Board (CAB) and then, after the CAB’s sunset in 1984, by the Department of Transportation. In 2004, “actual control” was specifically codified in the statutory definition of a citizen of the United States reflecting Departmental precedent, but it remains for the Department to interpret that requirement. As part of the fitness review, the Department reviews the totality of circumstances of an airline’s organization, including its capital structure, management, and contractual relationships, to ensure its compliance with the “actual control” requirement before issuing an air carrier license, and thereafter as its circumstances change.

\* \* \* \*

We tentatively find that our interpretation of the actual control test has failed to keep pace with changes in the global economy and evolving financial and operational realities in the airline industry itself, to the detriment of U.S. carriers. In view of the increasingly global character of finance and transportation, two things need to be done: U.S. policy must be more receptive to foreign investment,

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and broad guidelines need to be published to attract that investment, while at the same time protecting those areas of airline operations where there currently remains significant government involvement or regulation. We propose to adapt our interpretation of how foreign capitalization affects the “actual control” of U.S. airlines to reflect the new realities of globalization in the airline and financial industries. With this new guidance, we are striving to alleviate concerns that air carriers are being barred from a significant source of potential capital. In granting greater access to global capital, we are continuing our policy of allowing the market to operate with minimal regulation. We are proposing to refine and articulate our policy in an effort to provide guidance to air carriers with questions concerning the Department’s interpretation of actual control.

\* \* \* \*

The law requires U.S. control of U.S.-flag airlines. This has not changed. We do not propose to allow “actual control” to shift to foreign hands. We do propose to ensure that the application of an “actual control” standard results in U.S. citizen control being exercised in those areas of airline operations where there currently remains significant governmental involvement or regulation. Moreover, we want to ensure that the test is not applied so broadly so as to unnecessarily inhibit U.S. carriers’ access to the global capital market.

Our proposal would not affect the objective statutory requirements that a corporation must satisfy to qualify as a U.S. citizen, including the requirements that it be organized under the law of a U.S. jurisdiction; that 75 percent of the voting interest be owned or controlled by U.S. citizens; and that the President and two-thirds of the managing officers and directors be U.S. citizens. These standards are mandated by law and shall continue to be rigorously enforced, unless and until Congress changes them. In considering what areas of airline structure and finance should remain under the existing rubric of “actual control” we are mindful of certain important objectives. The first is the requirement that any U.S. carrier must maintain vigorous compliance with safety and security requirements. Similarly, U.S. carriers must be able to continue to incur and honor obligations made directly to the U.S. Government, in

particular the Civil Reserve Air Fleet program administered by the U.S. Department of Defense. These are areas in which, despite economic deregulation, there continues to be significant Federal government regulation and involvement.

This proposal also retains the requirement that U.S. citizens have control (*i.e.*, the ability to make decisions that are not subject to substantial influence by foreign interests) over the creation and amendment of the organizational documents (such as the charter, certificate of incorporation and by-laws, and/or membership agreement) of the governing entity. This, of course, does not mean that the actual draftsman in a law firm or corporate legal department need be a U.S. citizen. Rather, such “organic” documents must clearly reflect, by both genesis and content, initial and continued actual control by U.S. citizens. Foreign citizens may hold rights essential to protect their financial interests—for example, provisions requiring concurrence before a company may enter bankruptcy or be dissolved—but the fundamental organization of the company must remain in U.S. citizen hands.

With these considerations in mind, we propose a policy statement setting forth the criteria that will be used to determine whether an air carrier is under the “actual control” of U.S. citizens.

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#### [14 CFR] PART 399—STATEMENTS OF GENERAL POLICY

\* \* \* \*

##### § 399. 88 Actual control of U.S. air carriers.

(a) *Applicability.* This policy shall apply to all direct air carriers submitting information to the Air Carrier Fitness Division under part 204 of this title, with respect to its status as a “Citizen of the United States” as defined in 49 U.S.C. 40102(a)(15), of the Act. This policy shall only apply to the interpretation of “actual control” contained in 49 U.S.C. 40102(a)(15)(C) in determining air carrier fitness/citizenship to receive or retain a certificate of public convenience and necessity.

(b) *Policy.* In cases where there is significant involvement in investment by non-U.S. citizens and either where their home country

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does not deny citizens of the United States reciprocal access to investment in their carriers and does not deny U.S. carriers full and fair access to their air services market, as evidenced by an Open Skies agreement, or where it is otherwise appropriate to ensure consistency with U.S. international legal obligations, the Department will consider the following when determining whether U.S. citizens are in “actual control” of the carrier:

(1) All necessary organizational documentation, including such documents as charter of incorporation, certificate of incorporation, by-laws, membership agreements, stockholder agreements, and other documents of similar nature. The documents will be reviewed to determine whether U.S. citizens have and will in fact retain actual control of the air carrier through such documents.

(2) The carrier’s operational plans and actual operations to determine whether U.S. citizens have actual control with respect to:

(A) Decisions whether to make and or continue Civil Reserve Air Fleet (CRAF) commitments, and, once made, the implementation of such commitments with the Department of Defense;

(B) Carrier policies and implementation with respect to transportation security requirements specified by the Transportation Security Administration; and

(C) Carrier policies and implementation with respect to safety requirements specified by the Federal Aviation Administration.

\* \* \* \*

### B. INTERNATIONAL BORDER CROSSINGS

#### **Procedures for Issuance of a Presidential Permit in Certain Transfer Situations**

On May 24, 2005, the Office of the Under Secretary of State for Economic and Agricultural Affairs issued Public Notice 5092, “Procedures for Issuance of a Presidential Permit Where There Has Been a Transfer of the Underlying Facility,



Bridge or Border Crossing for Land Transportation.” 70 Fed. Reg. 30,990 (May 31, 2005). The procedures provide that the Department of State (1) “will seek a commitment from a transferee entity that it will abide by the relevant terms and conditions of the previously-issued [Presidential] permit” for the underlying facility, bridge or border crossing; (2) will request that the transferee entity submit an application for a new permit, including information concerning the transferee and the operation of the facility, bridge, or border crossing; and (3) once the commitment and application are received, “will process the application in accordance with the procedures set forth in E.O. 11423, as amended, or E.O. 13337, as applicable,” except that where the transferee “further indicates that the operations of the relevant facility, bridge or border crossing will remain essentially unchanged from that previously permitted, the Department of State, pursuant to 22 CFR 161.7(b)(3), does not intend to conduct an environmental review of the application . . . unless information is brought to its attention . . . that the transfer would have a significant impact on the quality of the human environment.”

The notice also stated that the procedures “apply in a given case only to the extent that they are consistent with a prior Congressional authorization (if any). . . . The Department of State also reserves the right to deviate from these procedures in particular cases.”

## **C. NORTH AMERICAN FREE TRADE AGREEMENT AND RELATED ISSUES**

### **1. NAFTA Chapter 11 Investor Disputes**

#### **a. Methanex Corp. v. United States**

On August 3, 2005, the NAFTA arbitration tribunal established in *Methanex Corp. v. United States* issued its decision in which it dismissed all claims against the United States and awarded \$3 million to the United States in costs. The tribunal’s operative order, Award at 300-301, is set forth below. The full texts of the award and other submissions and rulings in

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the case, as well as links to the media releases excerpted below, are available at [www.state.gov/s/l/c5818.htm](http://www.state.gov/s/l/c5818.htm). See also *Digest 2001* at 570-611, *Digest 2002* at 616-23, *Digest 2003* at 615-36, and *Digest 2004* at 574-94.

\* \* \* \*

. . . [T]he Tribunal makes the following decisions in this Award:

(1) *Jurisdiction*: The Tribunal decides, pursuant to Article 21 of the UNCITRAL Arbitration Rules and Article 1101 NAFTA, that it has no jurisdiction to determine the claims advanced by Methanex in its Second Amended Statement of Claim;

(2) *Merits*: Assuming that the Tribunal had jurisdiction to determine the claims advanced by Methanex in its Second Amended Statement of Claim, the Tribunal decides, pursuant to Article 21(4) of the UNCITRAL Arbitration Rules and Articles 1102, 1105 and 1110 NAFTA, to dismiss on their merits all claims there advanced by Methanex;

(3) *Legal Costs*: The Tribunal decides, pursuant to Articles 38(e) and 40(2) of the UNCITRAL Arbitration Rules, that Methanex shall pay to or to the order of the USA the sum of US [\$1,939,423.76]\* within 30 days of the date of this award in respect of the USA's legal costs incurred in these arbitration proceedings;

(4) *Arbitration Costs*: The Tribunal decides, pursuant to Articles 38(a), (b), (c) & (f), 39(1) and 40(1) of the UNCITRAL Arbitration Rules, that Methanex shall bear in full the other costs of the arbitration, requiring Methanex to indemnify the USA within 30 days of the date of this award in the further sum of US \$1,071,539.21.

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\* The figure shown for legal costs in the tribunal's August order was \$2,989,423.76. On November 2, 2005, the tribunal issued a "Correction in Accordance with Article 36 of the UNCITRAL Arbitration Rules and the Tribunal's Order of 29th August 2005" to the Final Award correcting a mathematical error in the calculation and providing for legal costs of \$1,939,423.76.

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Excerpts below from a press statement released by the Department of State on August 10, 2005, describe the significance of the award. The statement is available at [www.state.gov/r/pa/prs/ps/2005/50964.htm](http://www.state.gov/r/pa/prs/ps/2005/50964.htm).

In a major victory for the United States, a three-member NAFTA arbitration tribunal yesterday dismissed a \$970 million claim filed by a Canadian methanol producer challenging California's regulations of the gasoline additive MTBE. . . . The Office of the Legal Adviser of the Department of State represented the United States in the case.

. . . In an unprecedented step, the Tribunal also ordered Methanex to pay the United States more than \$[3] million in legal costs and arbitral expenses.

The Tribunal's decision demonstrates that U.S. trade agreements and investment treaties do not encroach on governments' legitimate right to regulate in the public interest. It should reassure those who are concerned that investor-State dispute provisions in U.S. free trade agreements and investment treaties threaten state or federal prerogatives in regulating to protect public health and the environment. Moreover, the Tribunal's award of costs to the United States should discourage similarly baseless claims from being brought in the future.

A Department of State media note released on the same day summarized the issues and their resolution as excerpted below. The media note is available at [www.state.gov/r/pa/prs/ps/2005/50967.htm](http://www.state.gov/r/pa/prs/ps/2005/50967.htm).

The methanol produced by Methanex is, among other things, used as an ingredient to produce the gasoline additive MTBE. Based on findings that MTBE contaminates drinking water, California banned the use of MTBE in California gasoline. Methanex claimed that the ban violated the provisions of NAFTA's Chapter Eleven prohibiting nationality-based discrimination against investors and their investments, requiring fair and equitable treatment of investments and prohibiting uncompensated takings of property.

Methanex also alleged that the ban on the use of MTBE related to Methanex because it was adopted with the intention of harming Methanex and other foreign methanol producers in order to benefit the U.S. ethanol industry.

The United States maintained that the California measures did not relate to Methanex and therefore could not be the basis for a NAFTA Chapter Eleven claim. It also maintained that Methanex was not treated differently from U.S.-owned methanol producers, was not treated in violation of any minimum standard of treatment required by international law and did not suffer an expropriation of its property.

The Tribunal agreed with all of these arguments made by the United States. It held that Methanex did not face any nationality-based discrimination, was not treated in a manner that could be said to violate international law standards and did not suffer an expropriation of any property interest. Moreover, the Tribunal held that the California measures were not intended to harm Methanex or other foreign methanol producers and did not otherwise relate to Methanex; thus the claim was not covered by the investor-State arbitration provisions of the NAFTA.

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**b. Consolidation order in softwood lumber disputes**

On September 7, 2005, a consolidation tribunal\* issued an order granting the request of the United States for consolidation of three claims against the United States submitted to arbitration under NAFTA Chapter Eleven: *Canfor Corporation v. United States*, *Tembec Inc. et al. v. United States*, and *Terminal Forest Products Ltd. v. United States*. The full text

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\* As explained in a letter of March 7, 2005, from the United States requesting consolidation,

Article 1126(5) of the NAFTA provides that “the Secretary-General shall establish a tribunal comprising three arbitrators” within sixty-days of receiving a request by a disputing party. The tribunal may, “in the interests of fair and efficient resolution of the claims,” consolidate any claims “that have a question of fact or law in common.”

of the tribunal's order, excerpted below, is available at [www.state.gov/documents/organization/53113.pdf](http://www.state.gov/documents/organization/53113.pdf). See also March 3, 2005, U.S. Request for Consolidation; June 3, 2005, Submission of United States in Support of Request for Consolidation, and other written and oral pleadings and orders in the proceeding at [www.state.gov/s/l/c14432.htm](http://www.state.gov/s/l/c14432.htm); and [www.state.gov/s/l/c3741.htm](http://www.state.gov/s/l/c3741.htm) for records in the Article 1120 proceedings prior to consolidation.

\* \* \* \*

## II. PROCEDURE

3. The claims filed against the United States by Canfor Corporation ("Canfor"), Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (collectively referred to as "Tembec"), and Terminal Forest Products Ltd. ("Terminal"), all Canadian producers of softwood lumber, concern a number of countervailing duty and antidumping measures adopted by the United States relating to Canadian softwood lumber products.

\* \* \* \*

## IV. SUMMARY OF THE PARTIES' POSITIONS

### A. Position of the United States

25. In its request for consolidation of 7 March 2005 and its submission of 3 June 2005, the United States contends that common issues of law and fact call for consolidation.

26. With respect to the issues of law, the United States points out that it objects to the jurisdiction of all three claims on the basis that NAFTA Article 1901(3) expressly bars the submission of claims regarding antidumping and countervailing duty law to arbitration under Chapter 11 of the NAFTA. The United States also objects to jurisdiction on the basis that the claims do not "relate to" Claimants or their U.S.-based investments as required by NAFTA Article 1101(1). Finally the United States contends that jurisdiction is lacking over Tembec's and Canfor's claims because those Claimants filed claims before NAFTA Chapter 19 bi-national panels with

respect to the same measures at issue here, in violation of the NAFTA Article 1121(1).\*

27. Furthermore, according to the United States, all three Claimants allege that the same measures breach the same provisions of the NAFTA, namely, Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation), and assert the same factual bases for those alleged breaches. The United States anticipates that, if the cases reach the merits, it would raise many of the same legal defenses to the claims of all three Claimants.

28. With respect to the issues of fact, the United States asserts that Claimants are all Canadian softwood lumber producers that export softwood lumber to the U.S. market. The United States contends that Claimants base their claims on the same U.S. government measures, including (i) the U.S. Department of Commerce's ("Commerce") August 2001 preliminary countervailing duty determination; (ii) Commerce's August 2001 preliminary critical circumstances determination; (iii) Commerce's October 2001 preliminary antidumping determination; (iv) Commerce's March 2002 final countervailing duty determination; (v) Commerce's March 2002 final antidumping determination; (vi) the International Trade Commission's ("ITC") May 2002 final material injury determination; and (vii) the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"), enacted by the U.S. Congress in October 2000.

29. The United States further contends that considerations of fairness and efficiency favor consolidation because consolidation conserves resources, will result in an expeditious resolution of the claims, and is the only way to eliminate the risk and unfairness of inconsistent results.

30. In its post-hearing brief of 22 July 2005, the United States responded to the questions of the Consolidation Tribunal raised at the hearing ("United States PHB"). Those responses will be considered in the analysis of the Tribunal below.

31. In its reply post-hearing brief of 12 August 2005, the United States responds to a number of arguments by Claimants in their

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\* Editor's note: *See* C.2. below.

post-hearing briefs (“United States RPHB”). The United States contends that consolidation for purposes of jurisdiction should be granted; consolidation on the merits is warranted; the United States’ application is not time-barred; and Claimants’ attempt to vitiate Article 1126(2) should be rejected.

\* \* \* \*

## V. CONSIDERATIONS OF THE CONSOLIDATION TRIBUNAL

\* \* \* \*

### A. Article 1126 of the NAFTA

The question before this Tribunal is whether the NAFTA Chapter 11 claims, submitted by Canfor, Tembec and Terminal to arbitrations under Article 1120 of the NAFTA, should be consolidated in whole or in part. Where the claims of several parties to separate Article 1120 arbitrations have “a question of law or fact in common,” the Tribunal may, “in the interests of fair and efficient resolution of the claims,” issue an order pursuant to Article 1126(2) of the NAFTA, which provides:

Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

\* \* \* \*

### F. Conclusion

221. The Consolidation Tribunal concludes that all four conditions of Article 1126(2) of the NAFTA are met in the present pro-

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ceedings. First, it is common ground that the claims in question have been submitted to arbitration under Article 1120. Second, the Tribunal has found that many questions of law and fact are common in the three Article 1120 arbitrations. Third, the Tribunal has also found that the interests of fair and efficient resolution of the claims merit the assumption of jurisdiction over all of the claims. And fourth, the parties to the present proceedings have been heard.

222. The result in the present case differs from the one in the *Corn Products* case.\* There are several reasons for the different outcome, which include the following. First, the Order on Consolidation in *Corn Products* is silent about what Article 1126(2) requires for satisfying the term “a question of law or fact in common.” The Tribunal there wrote, without any further inquiry expressed in the Order, in ¶ 6: “The Consolidation Tribunal accepts that the claims submitted to arbitration do have certain questions of law or fact in common for purposes of Article 1126(2),” and at ¶ 15: “The Tribunal is persuaded that notwithstanding certain common questions of law and fact, the numerous distinct issues of state responsibility and quantum further confirm the need of separate proceedings.” Second, as a general proposition, the present Tribunal disagrees with the statements found in ¶ 9 of the *Corn Products* Order: “Two tribunals can handle two separate cases more fairly and efficiently than one tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity,” and in ¶ 10: “However, confidential information among competitors is much more easily protected in separate proceedings, which in turn also permit a far more efficient arbitration process under such circumstances.” Third, in ¶ 14, the *Corn Products* Tribunal notes: “Yet, as CPI pointed out in its written submission, Mexico did not indicate, apart from jurisdiction, common defenses it intends to raise to the claims.” While the present case involves also common questions of law and fact relating to jurisdiction, the same applies to liability as

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\* Editor’s note: In *Corn Products International, Inc. v. United Mexican States*, and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, the tribunal denied consolidation. *Order of the Consolidation Tribunal* (20 May 2005), available at [www.worldbank.org/icsid/cases/Corn\\_Archer\\_order\\_en.pdf](http://www.worldbank.org/icsid/cases/Corn_Archer_order_en.pdf).



well, in respect of which the United States has raised, and intends to raise, common questions of law and fact. Moreover, in the judgment of the present Tribunal, anticipated questions may also be taken into account if there is a degree of certainty that they will be raised. Fourth, while acknowledging the risk of inconsistent awards, in ¶ 16 of the *Corn Products* Order, it is stated that: “This Tribunal does not have before it a large number of identically or very similarly situated claimants. . . . The tax could, for example, constitute an expropriation as to one claimant, but not another.” This fact pattern does not apply to the present case. Lastly, in ¶ 19, the *Corn Products* Order emphasizes that the cases there “are not close to procedural alignment,” which is not applicable in the present case either.

223. The consequence of the decision of the present Consolidated Tribunal is that the Article 1120 Tribunals cease to function.

224. The next step in the proceedings will be for the Tribunal to consult with the parties about the conduct and sequence of the proceedings, having regard to the observations made in Sub-section A(m) above [titled “Where consolidated proceedings are to begin”].

225. The Tribunal reserves the decision on the award of costs of the present proceedings as referred to in Articles 38-40 of the UNCITRAL Arbitration Rules to a subsequent order, decision or arbitral award, having regard to the fact that none of the parties has made submissions on costs. Reservation of the decision on costs is also appropriate in light of the alternative relief sought by Canfor and Terminal in their reply post-hearing brief to the effect that, if consolidation is ordered, “the United States should be ordered to pay Canfor and Terminal’s costs that have been thrown away by virtue of the United States having been dilatory in bringing this consolidation application,” to which relief the United States has not had an opportunity to respond because of the timing of the relief sought.

\* \* \* \*

On December 17, 2005, the Consolidated Tribunal issued Procedural Order No. 1, available at [www.state.gov/documents/organization/58579.pdf](http://www.state.gov/documents/organization/58579.pdf). The tribunal noted, among other things, that in a letter of December 7, 2005, Tembec ad-

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vised that “Tembec removes its Statement of Claim from these Article 1126 arbitration proceedings, and is filing in U.S. District Court for the District of Columbia notice of motion to vacate the Tribunal’s decision and order of September 7, 2005, which terminated Tembec’s Article 1120 arbitration proceedings,” and requested that “the Tribunal order its Secretary to terminate the Article 1126 proceedings as to Tembec, and make a final accounting of arbitration fees and costs up until today’s date.” On this aspect of the case, the order required Canfor, Terminal, and the United States to respond to further letters from Tembec dated December 15, 2005. Tembec’s letter was filed in response to a U.S. letter of December 13, 2005, requesting the Tribunal to enter an order dismissing Tembec’s claims with prejudice. Pending resolution of the issue, the order stated that Tembec “is considered to continue to be a party to the present proceedings.”

### c. **Loewen v. United States**

On October 31, 2005, the U.S. District Court for the District of Columbia dismissed a petition to vacate a NAFTA tribunal award. *Loewen v. United States* (Civ. Action No. 04-2151 (RWR) D.D.C. 2005). The tribunal had dismissed the claims in an award dated June 26, 2003, *Loewen Group, Inc. and Raymond L. Loewen v. United States.*; see *Digest 2003* at 610-15 and *Digest 2002* at 623-42. The court dismissed the petition to vacate as time-barred under the Federal Arbitration Act, 9 U.S.C. § 10.

### 2. **NAFTA Chapter 19: Certain Softwood Lumber Products from Canada**

In 2002 Canada and the Canadian Lumber Trade Alliance (“CLTA”) referred a U.S. International Trade Commission (“ITC”) decision to a binational panel under NAFTA Chapter 19. In its May 2, 2002, determination, the ITC had found a threat of future material injury to the U.S. softwood lumber industry from dumped and subsidized imports of Canadian

softwood lumber into the United States in a countervailing duty determination. *See* 67 Fed. Reg. 36,022 (May 22, 2002); USITC Report in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), Pub. 3509 (May 2002).

Under Article 1904(2), review by the Chapter 19 panel was “to determine whether [the final] determination was in accordance with the antidumping [and] countervailing duty law of the [United States].” On October 12, 2004, in its fourth decision in the case, the Chapter 19 panel decided that the evidence on record concerning imports of softwood lumber from Canada did not support a finding of threat of material injury to U.S. competitors. On November 24, 2004, the Office of the U.S. Trade Representative requested the establishment of an Extraordinary Challenge Committee (“ECC”) under Article 1904.13 and Annex 1904.13 of NAFTA to review the panel’s decision. On August 10, 2005, the ECC confirmed the panel’s decision.

The full text of the ECC decision, excerpted below, is available at [www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ue2004010e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf). The panel decisions are available at [www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=380](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380).<sup>\*</sup> *See also* proceedings instituted against the United States concerning imports of Canadian softwood lumber products by certain Canadian lumber companies under NAFTA Chapter 11 and by Canada at the WTO, discussed in C.1.a. *supra* and D.3.b.(3) below.

\* \* \* \*

[2] The Request asked for an ECC to review the decisions and final order of the binational panel (“Panel”) in the softwood lumber dispute. The Panel had held that there was no substantial evidence

\* Editor’s note: Panel decisions concerning *Certain Softwood Lumber Products from Canada (Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order)*, 67 Fed. Reg. 36,068 (May 22, 2002), *corrected*, May 30, 2002, 67 Fed. Reg. 37,775 (May 30, 2002), are also available at [www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=380](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380).

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to support the finding by the International Trade Commission (“Commission”), an administrative agency of the United States, that the importation of certain softwood lumber from Canada in the period under investigation posed a threat of material injury to an industry in the United States. After two remands to the Commission for reconsideration, the Panel remanded the matter for a third time, directing the Commission to render a [determination] not inconsistent with the Panel’s conclusion, namely that the evidence on the record did not support a finding of a threat of material injury.

\* \* \* \*

[11] Accordingly, on September 10, 2004, the Commission entered a negative threat determination. . . . On October 12, 2004, the Panel affirmed [that determination].

\* \* \* \*

[13] [In asking the ECC to vacate the Panel’s decisions and its order of October 12, 2004,] [t]he United States alleges that, in committing [enumerated errors], the Panel “manifestly exceeded its powers, authority or jurisdiction” in contravention of NAFTA Article 1904.13(a)(iii). It also alleges that, by participating in the deliberations of the Panel when a reasonable person would think that he would not be impartial, Mr. Mastriani “was guilty of bias or materially violated the rules of conduct” contrary to NAFTA Article 1904.13(a)(i). Further, the United States asserts that each of the above alleged errors “has materially affected the Panel’s decision and threatens the integrity of the binational panel review process”, contrary to NAFTA Article 1904.13(b).

\* \* \* \*

The ECC denied the U.S. challenge and affirmed the panel decision, concluding in paragraph 187 that

(a) the Panel did not manifestly exceed its powers, authority or jurisdiction in refusing to permit the Commission to reopen the record in preparing its responses, in setting the time limits within which the Commission had to respond to *Panel Decision II*, or in ordering the Commission to enter a negative threat determination;

- (b) except on the issue of export orientation, the Panel did not exceed its powers, authority or jurisdiction by failing to apply the appropriate standard of review;
- (c) on the issue of export orientation, the Panel's failure to apply the appropriate standard of review was not material; and
- (d) the conduct of Panelist Mastriani did not create a reasonable apprehension of bias.

On September 13, 2005, the Coalition for Fair Lumber Imports filed suit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the constitutionality of the NAFTA Implementation Act regarding the dispute settlement procedure under chapter 19, including as it had been applied in the softwood lumber matter. *Coalition For Fair Lumber Imports Executive Committee v. United States of America*, 05-1366. A press release of that date by USTR Spokesperson Neena Moorjani commented as excerpted below. The full text of the press release is available at [www.ustr.gov/Document\\_Library/Spokesperson\\_Statements/Statement\\_of\\_USTR\\_Spokesperson\\_Neena\\_Moorjani\\_Regarding\\_the\\_Constitutional\\_Challenge.html?ht=](http://www.ustr.gov/Document_Library/Spokesperson_Statements/Statement_of_USTR_Spokesperson_Neena_Moorjani_Regarding_the_Constitutional_Challenge.html?ht=). The case was pending at the end of 2005.

... [T]he United States firmly believes that the dispute settlement procedure in the NAFTA, as it is structured and as it has been applied, complies with the Constitution. We remain strongly committed to the NAFTA, including the dispute settlement procedure, and the Administration will vigorously defend its constitutionality.

The dispute settlement process is a critical part of the NAFTA. This or a similar procedure have been negotiated by two Presidents and implemented twice by the Congress, once to implement the 1988 U.S.-Canada FTA and once to implement the NAFTA.

The United States has benefited tremendously from the NAFTA. Since 1993, U.S. merchandise exports to our NAFTA partners have more than doubled, growing nearly twice as fast as our exports to the rest of the world. The NAFTA has also increased trade in services, cross-border investment, and trilateral cooperation on a range of issues, including technical standards, energy, and environment.

### 3. North American Development Bank and Border Environment Cooperation Commission

On June 17, 2005, President Bush issued Executive Order 13380, "Implementing Amendments to Agreement on Border Environment Cooperation Commission and North American Development Bank." 70 Fed. Reg. 35,509 (June 21, 2005). The two entities were established pursuant to the Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission ["BECC"] and a North American Development Bank ["NADBank"] ("1993 Agreement"). The 1993 Agreement was implemented in the United States under the North American Free Trade Agreement ("NAFTA") Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) and Executive Order 12916 of May 13, 1994. *See* 59 Fed. Reg. 25,779 (May 18, 1994).

Executive Order 13380 implemented a 2002 amendment to the 1993 Agreement that included the creation of a single board for BECC and NADBank. Protocol of Amendment to the 1993 Agreement, signed by the United States and Mexico in Washington, D.C., on November 25, 2002, and in Mexico City on November 26, 2002. In signing Public Law No. 108-215 (which amended the NAFTA Implementation Act to authorize agreement to the amendments) into law on April 5, 2004, President Bush stated that "[t]he Act is intended to implement an agreement between the United States and Mexico to accelerate the delivery of environmental infrastructure projects on the border by improving the operations of the Border Environment Cooperation Commission and the North American Development Bank." Executive Order 13380, among other things, named as members of the single Board of Directors for the BECC and the NADBank the Secretary of State, the Secretary of the Treasury, the Administrator of the Environmental Protection Agency, and two representatives appointed by the United States: a representative of one of the U.S. border states, and a member of the U.S. public who is a resident

of the border region. *See* [www.whitehouse.gov/news/releases/2005/11/20051117-1.html](http://www.whitehouse.gov/news/releases/2005/11/20051117-1.html).

President Bush commented further on separation of powers issues in Public Law 108-215, as excerpted below. The full text of the signing statement is available at [www.whitehouse.gov/news/releases/2004/04/print/0040405-10.html](http://www.whitehouse.gov/news/releases/2004/04/print/0040405-10.html).

\* \* \* \*

Section 546 of Public Law 103-182, as added by section 1 of the Act, purports to direct the President to instruct United States representatives on the Board of Directors of the North American Development Bank to take a particular position with respect to certain grant proposals. Under the Constitution, the President alone is charged with developing the position of the United States in international fora. The executive branch will accordingly interpret this provision as a nonbinding recommendation from the Congress.

Sections 2(5) and 2(6) of the Act purport to require the annual report of the Secretary of the Treasury to include a description of discussions between the United States and Mexican governments. In order to avoid intrusion into the President's negotiating authority and ability to maintain the confidentiality of diplomatic negotiations, the executive branch will not interpret this provision to require the disclosure of either the contents of diplomatic communications or specific plans for particular negotiations in the future.

#### **D. WORLD TRADE ORGANIZATION**

##### **1. Ministerial Conference in Hong Kong**

Work on the Doha Development Agenda, launched in November 2001, continued at the Sixth WTO Ministerial Conference in Hong Kong from December 13-18. *See generally* [www.ustr.gov/WTO/Doha\\_Development\\_Agenda/Section\\_Index.html](http://www.ustr.gov/WTO/Doha_Development_Agenda/Section_Index.html).

***a. Statement by President Bush***

On September 14, 2005, President George W. Bush, addressing the UN High-Level Plenary Meeting, outlined the U.S. vision for the Hong Kong ministerial as excerpted below. The full text of President Bush's remarks is available at [www.un.int/usa/05print\\_gwb0914.htm](http://www.un.int/usa/05print_gwb0914.htm).

\* \* \* \*

A successful Doha Round will reduce and eliminate tariffs and other barriers on farm and industrial goods. It will end unfair agricultural subsidies. It will open up global markets for services. Under Doha, every nation will gain, and the developing world stands to gain the most. Historically, developing nations that open themselves up to trade grow at several times the rate of other countries. The elimination of trade barriers could lift hundreds of millions of people out of poverty over the next 15 years. The stakes are high. The lives and futures of millions of the world's poorest citizens hang in the balance—and so we must bring the Doha trade talks to a successful conclusion.

Doha is an important step toward a larger goal: We must tear down the walls that separate the developed and developing worlds. We need to give the citizens of the poorest nations the same ability to access the world economy that the people of wealthy nations have, so they can offer their goods and talents on the world market alongside everyone else. We need to ensure that they have the same opportunities to pursue their dreams, provide for their families, and live lives of dignity and self-reliance.

And the greatest obstacles to achieving these goals are the tariffs and subsidies and barriers that isolate people of developing nations from the great opportunities of the 21st century. Today, I reiterate the challenge I have made before: We must work together in the Doha negotiations to eliminate agricultural subsidies that distort trade and stunt development, and to eliminate tariffs and other barriers to open markets for farmers around the world. Today I broaden the challenge by making this pledge: The United States is ready to eliminate all tariffs, subsidies and other barriers to free flow of goods and services as other nations do the same. This is



key to overcoming poverty in the world's poorest nations. It's essential we promote prosperity and opportunity for all nations.

By expanding trade, we spread hope and opportunity to the corners of the world, and we strike a blow against the terrorists who feed on anger and resentment. Our agenda for freer trade is part of our agenda for a freer world, where people can live and worship and raise their children as they choose. In the long run, the best way to protect the religious freedom, and the rights of women and minorities, is through institutions of self-rule, which allow people to assert and defend their own rights. All who stand for human rights must also stand for human freedom.

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***b. U.S. agriculture proposal***

On October 10, 2005, the United States submitted a comprehensive proposal in the three areas of agriculture negotiations: export subsidies, market access, and domestic support. A fact sheet released by the Office of the United States Trade Representative, "U.S. Proposal for Bold Reform in Global Agriculture Trade," summarized the U.S. proposal as excerpted below. The full text of the fact sheet is available at [www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file281\\_8526.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file281_8526.pdf). See also opinion editorial by Ambassador Rob Portman, U.S. Trade Representative, available at [www.ustr.gov/Document\\_Library/Op-eds/2005/America's\\_proposal\\_to\\_kickstart\\_the\\_Doha\\_trade\\_talks.html](http://www.ustr.gov/Document_Library/Op-eds/2005/America's_proposal_to_kickstart_the_Doha_trade_talks.html). The text of the U.S. October 10 proposal is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

Building on Uruguay Round commitments and the July 2004 Framework agreement for agricultural modalities, the United States has presented a comprehensive package to move the WTO agriculture negotiations forward and unleash the full potential of the Doha Development Agenda.

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The U.S. proposal calls for reform in two stages:

- Stage 1: Substantial reductions of trade-distorting support measures and tariffs, along with the elimination of export subsidies, to be phased-in over a five year period.
- Stage 2: An additional five year phase-in period that delivers the elimination of remaining trade-distorting subsidies and tariffs in agriculture.

### Market Access

The United States calls for WTO Members to aggressively reduce tariffs. Using the “tiered formula” identified in the July 2004 framework and building on the elements proposed by the G-20, the U.S. calls for the following to be phased-in over five years:

- Progressive tariff reduction: Developed countries cut their tariffs by 55-90%. Lowest tariffs are cut by 55%, with cuts ranging to 90% for highest tariffs.
- Tariff rate caps: Establish a “tariff cap” ensuring no tariff is higher than 75%.
- Sensitive products: Limit tariff lines subject to “sensitive product” treatment to 1% of total dutiable tariff lines. For these lines, ensure full compensation by expanding TRQs where they exist, and find other means to address sensitive products where TRQs are not in place.
- Special provisions for developing countries: Create special and differential treatment provisions for developing countries to provide real improvements in access while ensuring import-sensitive sectors in those countries are afforded appropriate protection.

**What the Framework Says:** The July 2004 Framework calls for progressive tariff reductions delivering deeper cuts to higher tariffs. The Framework committed Members to substantial improvements in market access for all products including sensitive ones, to be granted through a combination of tariff quota expansion and tariff reductions. Further, the Framework identified negotiations over a tariff cap to be part of further discussions and it notes that developing countries will not be expected to cut tariffs as aggressively as developed economies.

### **Export Competition**

The United States calls for rapid elimination of export subsidies. The following rules would be phased-in by the year 2010:

- Export subsidies: Eliminate all agriculture export subsidies.
- Export credit programs: Establish specific disciplines on export credit programs to bring them in line with commercial practice, including a maximum repayment period of 180 days.
- STEs: Install new disciplines on export State Trading Enterprises that end monopoly export privileges, prohibit export subsidies, and expand transparency obligations.
- Food aid: Establish disciplines on food aid shipments that guard against commercial displacement by removing obstacles to emergency shipments and deliveries to countries with chronic food aid needs. Establish an objective test to identify commercial displacement in other circumstances.

**What the Framework Says:** The Framework commits all Members to ensuring parallel elimination of all forms of agricultural export subsidies by a credible end date. Specifically, Members agreed to eliminate all agricultural export subsidies, eliminate export credits of more than 180 days, discipline credits of less than 180 days, and eliminate the trade-distorting practices of State Trading Enterprises (STEs). It was also agreed that additional disciplines on food aid will be negotiated. The Framework states that the future use of monopoly powers by STEs will be subject to further negotiation.

### **Domestic Support**

The United States calls for substantial reductions in trade-distorting domestic support, with deeper cuts by countries with larger subsidies. The United States proposes the specific elements to be enacted within five years:

- Overall goals: Reduce overall levels of trade-distorting support by 53% for the United States and 75% for the European Union.

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- Amber box\*: Cut Aggregate Measurement of Support (AMS) by 60% for the United States and 83% by the European Union, with product-specific AMS caps based on 1999–2001 period.
- Blue box: Cap partially decoupled direct payments at 2.5% of the value of agricultural production.
- De minimis: Cut “de minimis” allowances for trade-distorting domestic support by 50% (from 5% of the value of production to 2.5%).

**What the Framework Says:** In the Framework, Members agreed to substantially reduce trade-distorting domestic support, with caps on support levels for specific commodities. Members agreed to harmonization in the reductions so that countries with higher levels of subsidy will be subject to deeper cuts. Per the Framework, in the first year of implementation, the overall level of trade-distorting support will also be reduced, with an initial cut of 20%. The Framework also requires that blue box support will be capped at five percent of a Member’s total value of agricultural production, with further negotiation over criteria to ensure blue box programs are less trade-distorting than amber box programs.

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### ***c. Fisheries subsidies***

On December 14, U.S. Trade Representative Rob Portman addressed an event at the WTO Ministerial sponsored by the UN Environmental Programme and World Wildlife Fund-In-

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\* Editor’s note: The current WTO “boxes” are described as follows in a document describing the U.S. proposal prepared by Dr. J.B. Penn, Under Secretary for Farm and Foreign Agricultural Services, U.S. Department of Agriculture, available at [www.state.gov/e/eb/rls/othr/2005/56976.htm](http://www.state.gov/e/eb/rls/othr/2005/56976.htm):

- Amber: most trade-distorting; tied to price or output; annual limit
- Green: none or minimally trade-distorting; decoupled support, no limit
- Blue: trade-distorting but has production-limiting features; no limit
- *De minimis*: up to 5% support allowed for product specific and non-product specific amber.

ternational. A press release of that date on the importance of curbing fisheries subsidies is excerpted below, and is available at [www.ustr.gov/Document\\_Library/Press\\_Releases/2005/December/Section\\_Index.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Section_Index.html) and at [www.state.gov/e/eb/rls/prsr/2005/58050.htm](http://www.state.gov/e/eb/rls/prsr/2005/58050.htm).

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“I welcome the support we have received from environmental groups on our efforts to curb fisheries subsidies that contribute to overfishing, and I am pleased that they are helping to raise the visibility of this issue in the global community,” said Ambassador Portman. “Stronger rules to curb these subsidies will be a very significant accomplishment for the WTO in the Doha Development Agenda.”

“These negotiations on fisheries are ground breaking. For the first time, the WTO is addressing a problem with direct and immediate consequences not only for trade but also for the marine environment and sustainable development. The high levels of subsidies are part of the reason that nearly 75% of fish stock are at risk. The need for action is clear.” . . .

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### **Background**

According to the United Nations Food and Agriculture Organization, 75% of the world’s fish stocks are either overexploited, fully exploited, depleted or recovering depletion, while global subsidy levels are estimated at between \$10-15 billion annually—approximately 20-25% of the \$56 billion commercial trade in fish.

The United States has been a leader in pressing for stronger rules, including a prohibition on the most harmful subsidies that contribute to overcapacity and overfishing. The United States is working closely with a number of developed and developing countries to advance the negotiations, including Australia, Argentina, Chile, Ecuador, Iceland, New Zealand and Peru. Negotiations on fisheries subsidies are taking place in the Negotiating Group on Rules.

**d. Ministerial Declaration**

At the conclusion of the conference, on December 18, 2005, negotiations of the Doha Development Agenda were not completed. The participants in Hong Kong agreed to the text of the Ministerial Declaration, available at [www.wto.org/english/thewto\\_e/minist\\_e/mino5\\_e/final\\_text\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mino5_e/final_text_e.htm). A series of updates released on that date by USTR summarized the results of the ministerial conference by topic, as excerpted below. The updates are available at [www.ustr.gov/WTO/Doha\\_Development\\_Agenda/Results\\_from\\_Hong\\_Hong/Section\\_Index.html](http://www.ustr.gov/WTO/Doha_Development_Agenda/Results_from_Hong_Hong/Section_Index.html).

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**Duty-Free Quota-Free**

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The results of the Hong Kong Ministerial included a political commitment to provide duty-free/quota-free market access to products from LDCs.

The Hong Kong political commitment is to provide duty-free/quota-free market access for at least 97 percent of tariff lines. Ministers also agreed to take steps to progressively expand beyond 97 percent—but to take into account any impact on other developing countries at similar levels of development as LDCs.

Ministers agreed that Members would implement the initiative coincident with the implementation of the results of the negotiations under the Doha Development Agenda. Members may also implement sooner.

Ministers also agreed that implementation of this political commitment would be accomplished on an autonomous basis, through their respective preferential trade regime, such as the U.S. Generalized System of Preferences.

**Non-Agricultural Market Access (“NAMA”)**

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... The NAMA negotiations aim to remove barriers to trade in industrial and consumer goods.

The NAMA text coming out of Hong Kong locks in progress since the July 2004 Framework and tops-up that progress in a few key areas. The text also reaffirms the key role of liberalizing sectoral tariffs and reducing non-tariff barriers to trade.

In Hong Kong, Members reaffirmed the goal of reducing or eliminating tariff peaks, high tariffs and tariff escalation. Members agreed that this should be achieved partly through a harmonizing (Swiss) tariff cutting formula. The exact structure and details of the formula will be worked out in tandem with market access solutions in agriculture. The United States seeks to level the playing field for U.S. businesses. Average WTO-legal U.S. industrial tariffs are 3.2% as compared with 30.8% for all WTO Members.

Work on sectoral tariff liberalization has gained momentum over the past year. WTO Members are pursuing sectoral discussions in a variety of global industries that represent key economic building blocks. The discussions have increasingly involved a mixture of developed and developing countries from every trading region. This creates a solid platform for interested Members to negotiate the specifics in 2006.

Negotiators provided a boost to the important efforts to reduce or eliminate non-tariff barriers by recognizing the work accomplished to date and calling for introduction of detailed negotiating proposals early in the new year. This sets the stage for the United States and other governments to address the variety of NTBs that impede market access for global industries such as automobiles, electronics and wood products, barriers that often are as damaging and more trade-distorting than the remaining tariffs. It also opens up the door to push for agreement on new horizontal rules to free up trade in remanufactured goods.

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## Services

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The agreement at Hong Kong establishes a solid platform for future progress in the services negotiations. It includes a commitment

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to intensify negotiations and sets deadlines for submitting offers and finalizing negotiations. Highlights of the Services text include:

- A commitment to intensify market access negotiations to achieve progressively higher levels of liberalization across all service sectors and modes of supply—providing a basis to press for robust results in key sectors such as financial services, telecommunications, computer and related services, express delivery, distribution, and energy services.
- The Ministerial Declaration reaffirms the sovereign right of each country to regulate, and highlights the GATS requirement to extend appropriate flexibility to developing countries.
- The Declaration sets objectives for market access commitments, approaches for expediting the negotiations, and confirms deadlines of February 2006 for plurilateral requests, July 31, 2006 for a second round of revised offers, and October 31, 2006 for final offers.

### Trade Facilitation

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The United States has been working closely with key trading partners of all development levels to move the Trade Facilitations forward. Red tape and unnecessary formalities at the border can wipe away any gains made in improving market access through lower tariffs, and uncertainty about import requirements, hidden fees, and slow border release times are among the non-tariff barriers most frequently cited by exporters worldwide. The negotiations are addressing these matters head-on.

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. . . The need for rules-based reform at the border has historically held back growth in trade between developing countries. In this context, the negotiations are also aimed at improving the effectiveness of the vast amounts of technical assistance being provided in this area.

### Results from Hong Kong

Ministers at Hong Kong set the stage for intensifying the WTO negotiations on Trade Facilitation (TF) and moving toward a con-



clusion in 2006. Significantly, the ministers endorsed recommendations by the Trade Facilitation Negotiating Group.

The WTO negotiations on Trade Facilitation were launched as part of the Doha round of negotiations, in accordance with a decision taken by Members in July 2004. The negotiations are aimed at clarifying and improving the WTO rules governing customs procedures, with the objective to enhance the transparency and efficiency of how goods cross the border. The negotiating mandate also includes work on enhancing technical assistance and improving cooperation between customs authorities.

The current WTO rules governing border procedures date back to 1947, and are ripe for updating and modernizing through the ongoing negotiations. More than 50 proposals for new rules have been submitted. Examples include providing for the use of the Internet to make more easily available the importing requirements of WTO Members, establishing expedited treatment for express shipments, and improving procedural fairness for traders.

### Cotton

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### Trade-Related Aspects

The Declaration addresses export subsidies, tariffs, and domestic support for cotton:

- Export Subsidies: The Declaration calls for the elimination of all forms of export subsidies for cotton by 2006. (To fulfill this pledge, the United States is already taking action by pursuing legislation to end the “Step-2” program)
- Market Access: Developed countries will give duty- and quota-free access to cotton exports from least-developed countries upon implementation of a final Doha Agreement.
- Domestic Support: Members agreed that the negotiating objective is to reduce trade-distorting domestic supports for cotton more ambitiously and more quickly than the general formula that is ultimately agreed.

### Development-Related Aspects

The Declaration endorses the efforts of member countries, including the United States, to provide development assistance to the African cotton sector, and it urges the development community to further scale up its cotton-specific development efforts.

With this Declaration, the United States will continue its efforts within the WTO to reform global agricultural trade through an ambitious overall outcome in the agriculture negotiations and reach agreement on a bold agriculture proposal on full modalities.

## 2. TRIPS and Public Health

On December 6, 2005, prior to the Hong Kong Ministerial Conference, agreement was reached in the WTO on a proposed amendment to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS Agreement") to enhance access to medicines. A press statement released by the U.S. Office of the United States Trade Representative welcomed the amendment and explained its effect, as excerpted below. The full text of the press statement is available at [www.ustr.gov/Document\\_Library/Press\\_Releases/2005/December/Section\\_Index.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Section_Index.html) and at [www.state.gov/e/eb/rls/prsrl/2005/57714.htm](http://www.state.gov/e/eb/rls/prsrl/2005/57714.htm). For discussion of the August 2003 waiver referred to in the statement, see *Digest 2003* at 673-79.

... The amendment would allow countries to override patent rights when necessary to export life-saving drugs to developing countries that face public health crises but cannot produce drugs for themselves. When adopted, the amendment will make permanent an arrangement agreed to and put in place by WTO Members in 2003. The United States played an instrumental role throughout this process.

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Agreement on the proposed amendment is the latest in a series of moves supported by the United States to ensure that intellectual property rules in the WTO complement efforts to enhance access to medicines. At the WTO Ministerial in Doha, Qatar, in 2001, WTO members issued a landmark political declaration: the Doha Decla-

ration on the TRIPS Agreement and Public Health (the Doha Declaration).

One major part of the Doha Declaration was agreement to provide an additional ten year transition period for pharmaceutical products (until 2016) for least developed countries, as proposed by the United States. The December 6 announcement follows an earlier announcement on November 29 that the WTO would extend the remaining TRIPS provisions for least developed countries from January 2006 until July 2013. The United States worked closely with the least developed countries and the other WTO members to extend this date.

Under the rules of the WTO, the amendment will now be circulated to WTO Members for adoption. WTO Members have until December 1, 2007 to accept the amendment. The amendment will go into effect, for those Members that adopt it, once 2/3 of the membership has adopted it. The waiver solution will remain in place until the amendment is in force.

#### Background

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The Doha Declaration affirmed that Members may use compulsory licensing to address public health crises. However, the TRIPS Agreement states that compulsory licenses should be used predominantly for the domestic market. As a result, some felt that countries that could not produce drugs for themselves would have difficulty importing them from abroad under a compulsory license. Paragraph 6 of the Doha Declaration recognized this problem and urged WTO Members to find a solution.

In August 2003, Members agreed to waive the provisions in the TRIPS Agreement that would have restricted the ability of countries to issue compulsory licenses to produce and export drugs to countries in need that could not produce drugs for themselves. The waiver was effective immediately and remains in effect today. Some Members, however, wanted to have the waiver become a permanent part of the TRIPS Agreement through an amendment. The United States has always strongly supported the amendment process and is pleased that an agreement has been reached. This amendment would make that solution permanent.

### 3. **Dispute Settlement**

A review of U.S. participation in WTO negotiations, implementation, and dispute settlement as of the end of 2005 is provided in Chapter II of the 2006 Trade Policy Agenda and 2005 Annual Report of the President of the United States on the Trade Agreements Program (“2005 Annual Report”), available at [www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2006/2006\\_Trade\\_Policy\\_Agenda/asset\\_upload\\_file520\\_9070.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/asset_upload_file520_9070.pdf). See also [www.ustr.gov/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html) for Snapshot of WTO Cases Involving the United States and briefs filed by the United States in WTO proceedings.

Panel and Appellate Body reports are available on the WTO website; see [www.wto.org/English/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/dispu_subjects_index_e.htm).

Selected disputes are discussed below.

#### **a. Disputes brought by the United States**

##### **(1) *China—Value-added tax on integrated circuits (DS309)***

On March 18, 2004, the United States requested consultations with China regarding its value-added tax (“VAT”) on integrated circuits (“ICs”). In July 2004 the United States and China notified the WTO of their agreement to resolve the dispute. See *Digest 2004* at 601-02. As summarized in the 2005 Annual Report, Ch. II at 76,

Effective [July 2004] China no longer certified any new IC products or manufacturers for eligibility for VAT refunds, and China no longer offered VAT refunds that favored ICs designed in China. By April 1, 2005, China stopped providing VAT refunds on Chinese-produced ICs to current beneficiaries. Based on these developments, the United States and China notified the DSB on October 5, 2005, that they had reached a mutually satisfactory solution.

(2) *European Union—Protection of trademarks and geographical indications for agricultural products and foodstuffs (DS174)*

On April 20, 2005, the WTO Dispute Settlement Body (“DSB”) ruled that the EU’s regulation on food-related geographical indications (“GIs”) is inconsistent with the EU’s obligations under the TRIPS Agreement and the GATT 1994. A summary of the case and its current status in the 2005 Annual Report, Ch. II at 77, is excerpted below. *See also Digest 2003* at 651-52.

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EU Regulation 2081/92, inter alia, discriminates against non-EU products and nationals with respect to the registration and protection of geographical indications for agricultural products and foodstuffs; it also protects geographical indications to the detriment of TRIPS-guaranteed trademark rights. The United States therefore considered this measure inconsistent with the EU’s obligations under the TRIPS Agreement and the GATT 1994. . . . A panel was established on October 2, 2003, to consider the complaints of the United States and [also of] Australia. . . . On April 20, 2005, the DSB adopted the panel report, which found that the EU’s regulation on food-related geographical indications (GIs), EC Regulation 2081/92, is inconsistent with the EU’s obligations under the TRIPS Agreement and the GATT 1994. This finding results from the long-standing U.S. complaint that the EU GI system discriminates against foreign products and persons—notably by requiring that EU trading partners adopt an “EU-style” system of GI protection—and provides insufficient protections to trademark owners. The WTO panel agreed that the EU’s GI regulation impermissibly discriminates against non-EU products and persons. The panel also agreed with the United States that Europe could not, consistent with WTO rules, deny U.S. trademark owners their rights; it found that, under the regulation, any exceptions to trademark rights for the use of registered GIs were narrow, and limited to the actual GI name as registered. The panel recommended that the EU amend its GI regulation to come into compliance with its WTO obligations.

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The EU, the United States, and Australia (which filed a parallel case) agreed that the EU would have until April 3, 2006, to implement the recommendations and rulings.

### (3) *European Union—Subsidies on large civil aircraft (DS316)*

On July 20, 2005, a panel was established to examine U.S. challenges to EU subsidies on large civil aircraft. A summary of the case and its current status in the 2005 Annual Report, Ch. II at 78, is excerpted below. *See* b.(7) below concerning EC allegations concerning U.S. subsidies.

On October 6, 2004, the United States requested consultations with the EU, as well as with Germany, France, the United Kingdom, and Spain, with respect to subsidies provided to Airbus, a manufacturer of large civil aircraft. The United States alleged that such subsidies violated various provisions of the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), as well as Article XVI:1 of the GATT 1994. Consultations were held on November 4, 2004. On January 11, 2005, the United States and the EU agreed to a framework for the negotiation of a new agreement to end subsidies for large civil aircraft. The parties set a three-month time frame for the negotiations and agreed that, during negotiations, they would not request panel proceedings.

The United States and the EU were unable to reach an agreement within the 90-day time frame. Therefore, the United States filed a request for a panel on May 31, 2005. The Panel was established on July 20, 2005. The U.S. request challenges several types of EU subsidies that appear to be prohibited, or actionable, or both.

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### (4) *Japan—Measures affecting the importation of apples (DS245)*

On August 30, 2005, the United States and Japan informed the DSB that they had reached a mutually agreed solution to this dispute. *See also Digest 2004* at 602-03 and *Digest 2003* at

652-54. A summary of the case and its current status in the 2005 Annual Report, Ch. II at 78-79, is excerpted below.

On March 1, 2002, the United States requested consultations with Japan regarding Japan's measures restricting the importation of U.S. apples in connection with fire blight or the fire blight disease-causing organism, *Erwinia amylovora*. These restrictions included: the prohibition of imported apples from U.S. states other than Washington or Oregon; the prohibition of imported apples from orchards in which any fire blight is detected; the prohibition of imported apples from any orchard (whether or not it is free of fire blight) should fire blight be detected within a 500 meter buffer zone surrounding such orchard; the requirement that export orchards be inspected three times yearly (at blossom, fruitlet, and harvest stages) for the presence of fire blight for purposes of applying the above-mentioned prohibitions; a post-harvest surface treatment of exported apples with chlorine; production requirements, such as chlorine treatment of containers for harvesting and chlorine treatment of the packing line; and the post-harvest separation of apples for export to Japan from those apples for other destinations. . . .

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On July 19, 2004, the United States requested the establishment of a DSU Article 21.5 compliance panel to evaluate Japan's revised measures [proposed for implementation]. . . . The panel issued its final report on June 23, 2005, finding Japan's revised measure in breach of Articles 2.2, 5.1 and 5.6 of the SPS Agreement. The DSB adopted the compliance panel report on July 20, 2005.

On August 25, 2005, Japan issued revised regulations eliminating its unnecessary and unjustified measures on U.S. apples, including among other things orchard inspections, buffer zones, and the surface disinfection of apple fruit. On August 30, 2005, the United States and Japan informed the DSB that they had reached a mutually agreed solution to the dispute.

Accordingly, the United States withdrew its Article 22.2 request to suspend concessions and other obligations to Japan, and Japan withdrew its Article 22.6 request for arbitration regarding the proposed level of suspension of concessions.

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(5) *Mexico—Measures affecting telecommunications services (DS204)*

On August 17, 2000, the United States requested consultations with Mexico regarding its commitments and obligations under the General Agreement on Trade in Services ("GATS") with respect to basic and value-added telecommunications services. On June 1, 2004, the DSB adopted a panel report agreeing with most of the U.S. claims and the two countries reached agreement on implementation. *See Digest 2004* at 604-05. In August 2004 Mexico modified its international telecommunications rules to allow the competitive negotiation of international interconnection rates, and in August 2005 Mexico enacted new rules to allow the resale of international and long distance services. On August 31, 2005, the United States and Mexico informed the DSB that Mexico had taken the steps required under their agreement.

(6) *Mexico—Definitive antidumping measures on beef and rice (DS295)*

In 2005 a panel established in this case issued its final report in favor of the United States on all major claims and the Appellate Body issued its final report on November 29, 2005, upholding all but one of the panel's findings. A summary of the case and its current status in the 2005 Annual Report, Ch. II at 80-81, is excerpted below. *See also Digest 2003* at 654-55.

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On June 16, 2003, the United States requested consultations on Mexico's antidumping measures on rice and beef, as well as certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure. . . . The United States requested the establishment of a panel on the measure on rice and the five measures of the Foreign Trade Act on September 19, 2003, and the DSB established a panel on November 7, 2003. . . .

On June 6, 2005, the panel issued its final report, siding with the United States on all of the major claims in dispute. Specifically, the panel found that Mexico improperly: (1) based its injury analy-



sis on outdated information and failed to examine half of the injury data it collected; (2) applied its antidumping measure to two U.S. exporters that were not dumping; (3) applied an adverse “facts available” margin to a U.S. exporter that had no shipments during the period of investigation; and (4) applied “facts available” margins to U.S. exporters and producers that it did not even investigate. The panel also found that six provisions of Mexico’s antidumping and countervailing duty law are inconsistent “as such” with the WTO Antidumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures.

On July 20, 2005, Mexico appealed the findings in the panel report. The Appellate Body issued its final report on November 29, 2005. The Appellate Body upheld all but one of the panel’s findings relating to the antidumping measure, and it upheld all of the panel’s findings relating to the provisions of Mexico’s antidumping and countervailing duty laws.

The one finding that the Appellate Body reversed went to the question of whether Mexico had properly applied “facts available” margins to U.S. exporters and producers it did not investigate, and the Appellate Body found on different grounds that Mexico had not acted properly in this respect. Accordingly, the bottom line did not change. The DSB adopted the panel and Appellate Body reports on December 20, 2005.

***b. Disputes brought against the United States***

***(1) Foreign Sales Corporation (“FSC”) tax provisions (DS108)***

In response to a European Union challenge to the Foreign Sales Corporation (“FSC”) provisions of U.S. tax law, in March 2000 the DSB adopted reports finding that the FSC tax exemption was inconsistent with U.S. WTO obligations. In January 2002 the DSB adopted reports finding that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (“ETI Act”), which repealed and replaced the FSC provisions, failed to bring the United States into compliance with its WTO obligations and in May the DSB authorized the EU to

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impose countermeasures on up to \$4.043 billion of U.S. exports.

On October 22, 2004, the President signed the American Jobs Creation Act of 2004 ("AJCA"), Pub. L. No. 108-357, 108 Stat. 1418 (2004). As explained in the 2005 Annual Report, Ch. II at 83,

The AJCA repealed the FSC/ETI regime and, consistent with standard legislative practice regarding major tax legislation, contained a transition provision and a "grandfather" provision for pre-existing binding contracts. On November 5, 2004, the EU requested consultations regarding the transition and grandfather provisions. Consultations took place on January 11, 2005. On January 31, 2005, the EU published a regulation that suspended the sanctions with effect from January 1, 2005. The EU requested establishment of a panel on January 13, 2005, and the DSB established a panel on February 17, 2005.

On September 30, 2005, the panel issued its report. The panel found that the AJCA maintains prohibited ETI subsidies through its transition and grandfathering provisions, and that the United States had failed to repeal the grandfather provisions contained in section 5 of the ETI Act, which provided for continued use of the FSC tax exemption. Accordingly, the panel found that the United States had not fully brought its measures into conformity with its obligations under the relevant covered agreements.

The United States appealed the report on November 14, 2005. *See also Digest 2004* at 605-06, *Digest 2003* at 660-61, *Digest 2002* at 677-93, and *Digest 2001* at 653-63.

### (2) *Continued Dumping and Subsidy Offset Act of 2000* ("CDSOA") (DS217/234)

This case was brought by ten countries and the European Union regarding an amendment to the Tariff Act of 1930 that provided for transfer of import duties collected under U.S. antidumping and countervailing duty orders to the companies that filed or supported the antidumping and countervail-

ing duty petitions (“CDSOA”). The DSB adopted panel and Appellate Body reports finding that the CDSOA was an impermissible specific action against dumping and subsidies. The United States stated its intention to implement the DSB recommendations and rulings, but failed to enact legislation to meet its implementation obligations. *See Digest 2004* at 606-07 and *Digest 2003* at 655-57. The current status of measures taken against the United States was summarized as excerpted below from the 2005 Annual Report, Ch. II at 87-88.

Based on requests from Brazil, the EU, India, Japan, Korea, Canada, and Mexico, on November 26, 2004, the DSB granted these Members authorization to suspend concessions or other obligations, as provided in DSU Article 22.7 and in the Decisions of the Arbitrators. The DSB granted Chile authorization to suspend concessions or other obligations on December 17, 2004. On December 23, 2004, January 7, 2005 and January 11, 2005, the United States reached agreements with Australia, Thailand and Indonesia that these three complaining parties would not request authorization to suspend concessions at that time, and that the United States would not object to a future request on grounds of lack of timeliness. On May 1, 2005, Canada and the EU began imposing additional duties of 15 percent on a list of products from the United States. On August 18, 2005, Mexico began imposing additional duties ranging from nine to 30 percent on a list of U.S. products. On September 1, 2005, Japan began imposing additional duties of 15 percent on a list of U.S. products.

(3) *Cases concerning softwood lumber from Canada\**

(i) *Final countervailing duty determination with respect to certain softwood lumber from Canada (DS257)*

On December 20, 2005, the DSB adopted panel and Appellate Body reports in a proceeding initiated by Canada in 2002

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\* *See also* cases under NAFTA Chapters 11 and 19, discussed in C.1. and 2. *supra*.

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regarding the U.S. Department of Commerce final countervailing duty determination concerning certain softwood lumber from Canada. Excerpts below from the 2005 Annual Report, Ch. II at 88-89, describe the case and the reports adopted.

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On May 3, 2002, Canada requested consultations with the United States regarding Commerce's final countervailing duty determination concerning certain softwood lumber from Canada. Among other things, Canada challenged the evidence upon which the investigation was initiated, claimed that Commerce imposed countervailing duties against programs and policies that are not subsidies and are not "specific" within the meaning of the Subsidies Agreement, and that Commerce failed to conduct its investigation properly. Consultations were held on June 18, 2002, and a panel was established at Canada's request on October 1, 2002.

. . . . In its report, circulated on August 29, 2003, the panel found that the United States acted consistently with the Subsidies Agreement and GATT 1994 in determining that the programs at issue provided a financial contribution and that those programs were "specific" within the meaning of the Subsidies Agreement. It also found, however, that the United States had calculated the benefit incorrectly and had improperly failed to conduct a "pass-through" analysis to determine whether subsidies granted to one producer were passed through to other producers. The United States appealed these issues to the Appellate Body on October 21, 2003, and Canada appealed the "financial contribution" issue on November 5.

On January 19, 2004, the Appellate Body issued a report finding in favor of the United States in all key respects. The Appellate Body reversed the panel's unfavorable finding with respect to the rejection of Canadian prices as a benchmark; upheld the panel's favorable finding that the provincial governments' provision of low-cost timber to lumber producers constituted a "financial contribution" under the Subsidies Agreement; and reversed the panel's unfavorable finding that Commerce should have conducted a "pass-through" analysis to determine whether subsidies granted to one lumber company were passed through to other lumber companies through the sale of subsidized lumber. The Appellate Body's

only finding against the United States was that Commerce should have conducted such a pass-through analysis with respect to the sale of logs from harvester/sawmills to unrelated sawmills.

The DSB adopted the panel and Appellate Body reports on February 17, 2004. The United States stated its intention to implement the DSB recommendations and rulings on March 5, 2004. On December 17, 2004, the United States informed the DSB that Commerce had revised its countervailing duty order, thereby implementing the DSB's recommendations and rulings.

Following a request by Canada, on January 14, 2005, the DSB established an Article 21.5 compliance panel to review the new Commerce determination. Canada also requested authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU, in the amount of C\$200,000,000. The United States objected to this level, referring the matter to arbitration. The parties agreed to request that the arbitration be suspended pending completion of the compliance proceeding.

On August 1, 2005, the compliance panel issued a report finding deficiencies in Commerce's implementation with respect to both the revised determination of subsidies and the first assessment review.

On September 6, the United States appealed the panel's inclusion of the first assessment review in the compliance proceeding. On December 5, 2005, the Appellate Body upheld that aspect of the panel report.

The DSB adopted the panel and Appellate Body reports on December 20, 2005.

*(ii) Final dumping determination on softwood lumber from Canada (DS264)*

On May 2, 2005, the U.S. Department of Commerce revised an antidumping determination against Canada on softwood lumber in order to come into compliance with recommendations and rulings of the Dispute Settlement Body adopted on August 31, 2004. At the end of the year, consideration of Canada's challenge to the measure was pending. Excerpts below

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from the 2005 Annual Report, Chapter II at 90, describe the case and its current status.

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On September 13, 2002, Canada requested WTO dispute settlement consultations concerning the amended final determination by Commerce of sales at less than fair value with respect to certain softwood lumber from Canada, along with the antidumping duty order with respect to imports of the subject products. Canada alleged that Commerce's initiation of its investigation concerning the subject products, as well as aspects of its methodology in reaching its final determination, violated the GATT 1994 and the Anti-dumping Agreement. . . . [T]he DSB established the panel on January 8, 2003. . . . In its report, the panel rejected Canada's arguments: (1) that Commerce's investigation was improperly initiated; (2) that Commerce had defined the scope of the investigation (i.e., the "product under investigation") too broadly; and (3) that Commerce improperly declined to make certain adjustment based on difference in dimension of products involved in particular transactions compared. The panel also rejected Canada's claims on company-specific calculation issues. The one claim that the panel upheld was Canada's argument that Commerce's use of "zeroing" in comparing U.S. price to normal value was inconsistent with Article 2.4.2 of the Antidumping Agreement.

On May 13, 2004, the United States filed a notice of appeal regarding the "zeroing" issue. Canada cross-appealed with respect to two company-specific issues (one regarding the allocation of costs to Abitibi, and the other regarding the valuation of an offset to cost of production for Tembec). The Appellate Body issued its report on August 11, 2004. The report upheld the panel's findings on "zeroing" and the Tembec issue. It reversed a panel finding regarding the Abitibi issue concerning interpretation of the term "consider all available evidence" in Article 2.2.1.1 of the Antidumping Agreement; however, it declined to complete the panel's legal analysis. The panel and Appellate Body reports were adopted at the August 31, 2004 DSB meeting. . . .

On May 2, 2005, Commerce issued a revised antidumping determination in which it established the existence of dumping using the transaction-to-transaction comparison methodology, rather

than the average-to-average methodology found to be inconsistent by the panel. On May 19, 2005, Canada challenged the measure taken to comply under Article 21.5 of the DSU.

Also on that date, Canada sought recourse to Article 22.2 of the DSU. On May 31, 2005, the United States objected to the level of suspension of concessions proposed by Canada pursuant to Article 22.2 and, accordingly, the matter was referred to arbitration under Article 22.6 of the DSU. On June 10, 2005, the United States and Canada jointly asked that the Article 22.6 arbitration be suspended pending conclusion of the Article 21.5 proceeding.

*(iii) Investigation of the U.S. International Trade Commission in softwood lumber from Canada (DS277)*

In this proceeding, initiated by Canada in December 2002, a panel report of November 15, 2005, rejected Canada's claim that a threat determination by the U.S. International Trade Commission ("USITC") was not supported by evidence and analysis such that an objective and unbiased investigating authority could have made that determination. The threat determination at issue in the November 2005 panel report was a revision of the USITC's original May 2002 determination, which the USITC issued on November 24, 2004, in order to bring the United States into compliance with the recommendations and rulings of the Dispute Settlement Body adopted on April 26, 2004. As of the end of 2005, the panel report had not been adopted or appealed. Excerpts follow from the summary of the proceeding in the 2005 Annual Report, Chapter II at 93.

On December 20, 2002, Canada requested consultations concerning the May 16, 2002 determination of the USITC that imports of softwood lumber from Canada, which Commerce found to be subsidized and sold at less than fair value, threatened an industry in the United States with material injury. Canada alleged that flaws in the USITC's determination caused the United States to violate various aspects of the GATT 1994, and the Antidumping and Subsidies Agreements.

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. . . [T]he DSB established a panel on May 7, 2003. . . . In its report circulated on March 22, 2004, the panel agreed with Canada's principal argument . . . that the USITC's threat determination was not supported by a reasoned and adequate explanation, and agreed with Canada that the USITC had failed to establish that imports threaten to cause injury. However, the panel: (1) declined Canada's request to find violations of certain overarching obligations under the Antidumping and Subsidies Agreements; (2) rejected Canada's argument that a requirement that an investigating authority take "special care" is a stand-alone obligation; (3) rejected Canada's argument that the USITC was obligated to identify an abrupt change in circumstances; (4) agreed with the United States that, where the Antidumping and Subsidies Agreements required the USITC to "consider" certain factors, the USITC was not required to make explicit findings with respect to those factors; (5) and rejected Canada's argument that the United States violated certain provisions of the applicable agreements that pertain to present material injury. The DSB adopted the panel report on April 26, 2004.

. . . On November 24, 2004, the USITC issued a new threat determination, finding that the U.S. lumber industry was threatened with material injury by reason of dumped and subsidized lumber from Canada. On December 13, Commerce amended the anti-dumping and countervailing duty orders to reflect the issuance and implementation of the new USITC determination.

At the January 25, 2005 DSB meeting, the United States announced that it had come into compliance with the DSB's recommendations and rulings. Canada sought recourse to Article 21.5 of the DSU, and an Article 21.5 panel was established on February 25, 2005. . . . The United States objected to the level of concessions that Canada proposed to suspend, and the matter was referred to arbitration under Article 22.6. The Article 22.6 arbitration was suspended pending the outcome of the Article 21.5 proceeding.

In its report circulated on November 15, 2005, the Article 21.5 panel rejected Canada's claim that the USITC's threat determination was not supported by evidence and analysis such that an objective and unbiased investigating authority could have made that determination.



*(4) Subsidies on upland cotton (DS267)*

On September 8, 2004, a panel established in response to a request by Brazil pertaining to alleged subsidies related to upland cotton circulated its report. *See Digest 2004* at 608-10. On appeal and cross appeal by the United States and Brazil, the Appellate Body circulated its report on March 3, 2005. Excerpts follow from the 2005 Annual Report, Chapter II at 91-92.

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On October 18, 2004, the United States filed a notice of appeal with the Appellate Body; Brazil then cross-appealed. The Appellate Body circulated its report on March 3, 2005. The Appellate Body upheld the panel's findings appealed by the United States.

The Appellate Body also rejected or declined to rule on most of Brazil's appeal issues.

On March 21, 2005, the DSB adopted the panel and Appellate Body reports and, on April 20, 2005, the United States advised the DSB that it intends to bring its measures into compliance.

On June 30, 2005, the United States announced certain administrative changes relating to its export credit guarantee programs. Further, on July 5, the United States proposed legislation relating to the export credit guarantee and Step 2 programs. On July 5, 2005, Brazil requested authorization to impose countermeasures and suspend concessions in the amount of \$3 billion. On July 14, 2005, the United States objected to the request, thereby referring the matter to arbitration. On August 17, 2005, the United States and Brazil agreed to suspend the arbitration. On October 6, 2005, Brazil made a separate request for authorization to impose countermeasures and suspend concessions in the amount of \$1.04 billion per year in connection with the "serious prejudice" findings. The United States objected to Brazil's request on October 17, 2005, and that matter was also referred to arbitration. On November 21, 2005, the United States and Brazil agreed to suspend the arbitration.

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(5) *Anti-dumping measures on oil country tubular goods  
("OCTG") from Mexico (DS282)*

On February 18, 2003, Mexico requested consultations regarding several determinations made in connection with an antidumping duty order on oil country tubular goods from Mexico, including sunset review determinations of the Department of Commerce and the USITC. Excerpts below from the 2005 Annual Report, Chapter II at 94-95, describe the case and its conclusion in favor of the United States in 2005.

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... The focus of this case appeared to be on the analytical standards used by Commerce and the USITC in sunset reviews, although Mexico also challenges certain aspects of Commerce's antidumping methodology. Consultations were held April 2-4, 2003. Mexico requested the establishment of a panel on July 29, 2003, and the DSB established a panel on August 29, 2003.

... On June 20, 2005, the panel [established in the case] circulated its report. The panel rejected Mexico's claim that certain aspects of the U.S. administrative review procedures are inconsistent with U.S. WTO obligations, as well as Mexico's claims regarding the USITC's laws and regulations regarding the determination of likelihood of injury and the likelihood determination itself. The panel did find that the Sunset Policy Bulletin and Commerce's likelihood determination itself were inconsistent with Article 11.3. On August 4, 2005, Mexico filed a notice of appeal regarding the panel's findings on likelihood of injury. The United States appealed the panel's findings regarding the Sunset Policy Bulletin. On November 2, 2005, the Appellate Body issued its report. The report upheld the panel's findings rejecting Mexico's claims regarding likelihood of injury. In addition, the Appellate Body reversed the panel's findings that the Sunset Policy Bulletin breaches U.S. obligations. The DSB adopted the panel and Appellate Body reports on November 28, 2005.

(6) *Measures affecting the cross-border supply of gambling and betting services (DS285)*

The final report of a panel established at the request of Antigua & Barbuda concerning gambling and betting found that the United States breached Article XVI (Market Access) of the GATS by maintaining three U.S. federal laws (18 U.S.C. §§ 1084, 1952, and 1955) and certain statutes of Louisiana, Massachusetts, South Dakota, and Utah and that these measures were not justified under exceptions in Article XIV of the GATS. The report was circulated on November 10, 2004. *See Digest 2004* at 610-11 and *Digest 2003* at 663-64.

The United States filed a notice of appeal on January 7, 2005. The Appellate Body issued its report on April 7, 2005, in which it reversed and/or modified several panel findings. The Appellate Body reversed all of the panel's findings of GATS-inconsistency with respect to state laws, and agreed with the United States that the three U.S. federal gambling laws at issue "fall within the scope of 'public morals' and/or 'public order'" exception in Article XIV of the GATS. The Appellate Body also found, however, that the United States had not demonstrated that it met the requirements of the Article XIV chapeau, which makes the exceptions provided therein "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services," with respect to remote gambling on horse racing. The DSB adopted the panel and Appellate Body reports on April 20, 2005. The United States stated its intention to implement the DSB recommendations and rulings on May 19, 2005. On August 19, 2005, an Article 21.3(c) arbitrator determined that the reasonable period of time for implementation will expire on April 3, 2006.

(7) *Subsidies on large civil aircraft (DS317)*

As noted in D.3.a.(3), *supra*, the United States and the European Union have each requested panels with respect to subsi-

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dies provided to certain manufacturers of large civil aircraft by the other. The European Union alleged that “prohibited and actionable subsidies provided to U.S. producers of large civil aircraft” violated several provisions of the Subsidies Agreement and Article III:4 of the GATT. As with the claims of the United States against the European Union, a panel was established on July 20, 2005. *See* 2005 Annual Report, Chapter II at 96.

### E. OTHER TRADE AND INVESTMENT AGREEMENTS AND RELATED ISSUES

#### 1. CAFTA

On August 2, 2005, President Bush signed into law legislation implementing the Dominican Republic-Central American Free Trade Agreement. Excerpts follow from the President’s signing statement, available at [www.whitehouse.gov/news/releases/2005/08/20050802-2.html](http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html). The text of the agreement and related documents are available at [www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Section_Index.html).

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All of us in this room understand that to keep our economy growing and creating jobs, we need to open markets for American products overseas. All of us understand that strengthening our economic ties with our democratic neighbors is vital to America’s economic and national security interests. And all of us understand that by strengthening ties with democracies in our hemisphere, we are advancing the stability that comes from freedom.

Right now, Central American goods face almost no tariffs when they enter the United States. By contrast, U.S. exports to Central America still face hefty tariffs there. CAFTA will end these unfair tariffs against American products and help ensure that free trade is fair trade.

By leveling the playing field for our products, CAFTA will help create jobs and opportunities for our citizens. As CAFTA helps create jobs and opportunity in the United States, it will help the de-

mocracies of Central America and the Dominican Republic deliver a better life for their citizens. By further opening up their markets, CAFTA will help those democracies attract the trade and investment needed for economic growth.

This economic growth will boost demand for U.S. goods and reduce poverty and contribute to the rise of a vibrant middle class. This economic growth will raise working standards and will deliver hope and opportunity to people who have made the choice for freedom. The more opportunity that Central Americans have at home to provide for themselves and their families means it's less likely that someone looking for a job will try to come to this country illegally.

By strengthening the democracies in the region, CAFTA will enhance our nation's security. Two decades ago, many of the CAFTA nations struggled with poverty and dictatorship and civil strife. Today, they're working democracies, and we must not take these gains for granted. These nations still face forces that oppose democracy, seek to limit economic freedom, and want to drive a wedge between the United States and the rest of the Americas. The small nations of CAFTA are making big and brave commitments, and CAFTA is a signal that the United States will stand with them and support them. By helping the CAFTA nations build free societies, we'll help them eliminate the lawlessness and instability that terrorists and criminals and drug traffickers feed on. And this will make our country safer.

\* \* \* \*

## **2. Other Free Trade Agreements**

During 2005 the United States concluded free trade agreements with Oman on October 3, 2005, and with Peru on December 7, 2005. The U.S.-Australia Free Trade Agreement entered into force on January 1, 2005. The text of these and other free trade agreements, with related documents, is available at [www.ustr.gov/Trade\\_Agreements/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Section_Index.html).

### 3. Extension of Trade Promotion Authority

In a letter dated March 30, 2005, President Bush requested that Congress “extend trade promotion authority procedures for 2 years [and] enclose[d] a report . . . on trade negotiations conducted under those procedures.” The letter is available at [www.whitehouse.gov/news/releases/2005/03/20050330-5.html](http://www.whitehouse.gov/news/releases/2005/03/20050330-5.html). The accompanying Report to Congress on the Extension of Trade Promotion Authority Consistent with Section 2103(c)(2) of the Trade Act of 2002 is available at [www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_TPA\\_Report/asset\\_upload\\_file433\\_7513.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_TPA_Report/asset_upload_file433_7513.pdf). The report explains:

On August 6, 2002, President Bush signed the Trade Act of 2002 (Trade Act), Title XXI of which contains the Bipartisan Trade Promotion Authority Act of 2002 (TPA Act). The TPA Act provides, in part, for “trade authorities procedures” to apply to bills implementing certain trade agreements that the President enters into before July 1, 2005.

The Act provides for extension of trade authorities procedures to include agreements concluded before July 1, 2007, if the President so requests in a report submitted to the Congress by April 1, 2005.

*See also Digest 2002 at 719-22.*

On July 1, 2005, trade promotion authority procedures were extended from July 1, 2005, until July 1, 2007, under the Trade Act of 2002.

In a press release of March 30, USTR described the extension process and its effect as excerpted below. The full text is available at [www.ustr.gov/Document\\_Library/Press\\_Releases/2005/March/Section\\_Index.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/March/Section_Index.html).

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To continue leveling the playing field and expanding trade opportunities for American farmers, workers, businesses and consumers, the Administration today requested an extension of Trade Promotion Authority (TPA). TPA, enacted as part of the Trade Act of 2002, provides a framework for Executive—Congressional coop-

eration in trade negotiations, including a streamlined mechanism for Congressional consideration of trade agreements.

The Administration's report accompanying the extension request details the progress achieved to date under TPA and prospects for completing current negotiations.

\* \* \* \*

TPA currently applies to trade agreements signed before July 1, 2005. The Administration's request will extend that deadline to July 1, 2007 unless either House disapproves by July 1, 2005. Passage of TPA legislation in August 2002 was a major achievement of President Bush's first term. Earlier efforts to renew "fast track" legislation after it lapsed in 1994 were unsuccessful, and America fell behind as the European Union, Mexico, and many other nations negotiated dozens of trade agreements that set new rules and opened growing markets for their exports, putting the United States at a competitive disadvantage. . . . Continued cooperation between Congress and the President through TPA will be critical in bringing current bilateral, regional and global negotiations to successful conclusions.

#### **Background on TPA:**

TPA provides for close collaboration between the President and Congress in opening foreign markets for U.S. goods and services. First, it gives the Executive branch specific Congressional guidance on objectives to seek in trade negotiations. TPA also sets detailed notice and consultation requirements for the Administration to follow to ensure it has the benefit of advice from the Congress, private sector, and the public before and during negotiations. TPA establishes a special Congressional Oversight Group through which Members of Congress provide timely advice to the Administration on trade negotiations and receive regular briefings from the United States Trade Representative on proposed U.S. negotiating positions. In addition, the Administration's trade negotiators brief and seek advice from Congressional committees before each negotiating round. This process ensures close coordination and regular exchange of information between the two branches.

Second, if the Administration follows TPA notice and consultation procedures, TPA provides for Congress to vote "yea" or "nay"

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on resulting trade agreements and implementing legislation as a whole within a set period.

### **Background on Administration use of TPA to level the playing field and open markets:**

In close consultation with Congress, the President has used TPA to initiate a new trade strategy: simultaneously pursuing mutually reinforcing trade initiatives globally, regionally and bilaterally. This strategy has created strong incentives for trading partners to move forward, while also establishing models for state-of-the-art rules. Since August 2002, the Congress has, under TPA, approved groundbreaking FTAs with Chile, Singapore, Australia and Morocco, with strong bipartisan support in both chambers. And, in close consultation with the Congress, the President has concluded two additional FTAs—one with five Central American countries and the Dominican Republic (CAFTA-DR) and another with the Persian Gulf country of Bahrain.

### **4. Chinese Apparel and Textile Exports to the United States**

#### ***a. U.S.-China textile agreement***

On November 8, 2005, U.S. Trade Representative Rob Portman and Chinese Minister of Commerce Bo Xilai announced that the United States and China had reached “a broad agreement on textile trade.” A press release from USTR is available at [www.ustr.gov/Document\\_Library/Press\\_Releases/2005/November/Section\\_Index.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/November/Section_Index.html).

A fact sheet issued on the same date, “Benefits from Establishing Quotas on Certain Chinese Apparel Exports to the United States” is set forth below and available at [www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2005/asset\\_upload\\_file813\\_8339.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file813_8339.pdf).

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*Term:* The Agreement goes into effect on January 1, 2006 and ends on December 31, 2008.



*Product Coverage:* The Agreement places quotas on a broader array of products (34) than are currently subject to China safeguards (19).

*Tight Quotas:* The quotas established under the Agreement compare favorably to quotas that would have been imposed if China textile safeguards were invoked. In 2006, the Agreement imposes tighter limits on Chinese exports of “core” apparel products<sup>1</sup> than any quotas that could have been imposed under the China safeguard in 2006. In general, quotas established by the Agreement for 2006 on “core” products are lower than the safeguard threshold, about the same as the safeguard threshold for 2007, and higher than the safeguard threshold for 2008. Over the life of the Agreement, China can export 3.2% more of the covered products to the United States than if the safeguards were invoked on all of the covered products for all three years.

*Predictability and Certainty:* The Agreement’s broad product coverage and three-year lifespan will allow all private sector stakeholders to plan in a more stable and predictable environment, including African producers and exporters.

*Future Use of the Safeguard:* The U.S. promised to exercise “restraint” in future use of the safeguard on those products not covered by the Agreement.

*Smooth Transition:* The Agreement contains mechanisms to allow U.S. importers and the Government of China to manage quotas and avoid overshipments. For example, China will manage its exports with a visa system and can borrow small amounts of quota from future years to cover overshipments. In addition, the Agreement’s January 1, 2006 start date will allow importers and retailers to prepare for changes.

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<sup>1</sup> “Core” apparel products are cotton knit shirts, man-made fiber (mmf) knit shirts, woven shirts, cotton trousers, mmf trousers, brassieres, and underwear.

**b. China safeguard mechanism**

**(1) Litigation**

Implementation of the China textile safeguard provision referred to in the fact sheet *supra* has been the subject of litigation in the United States. On June 28, 2005, the U.S. Court of Appeals for the Federal Circuit reversed a lower court decision granting a preliminary injunction against consideration of requests for textile and apparel safeguard actions on imports from China by the inter-agency Committee for the Implementation of Textile Agreements (“CITA”). *U.S. Ass’n of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005). Plaintiffs argued that the CITA had “reinterpreted” its regulations and could not be allowed to consider requests alleging “threat” of market disruption rather than “current” market disruption. See discussion of International Trade Court decision in *Digest 2004* at 612-15.

Excerpts below from the appeals court opinion describe the textile safeguard provision and the court’s decision finding, among other things, that the plaintiff had not demonstrated even “a fair chance of success on the merits” to justify the granting of the preliminary injunction. Footnotes have been omitted.

\* \* \* \*

Pursuant to the Agreement on Textiles and Clothing (“ATC”), previously existing quotas on the importation of textiles and apparel products made in WTO member countries were to be gradually phased out by January 1, 2005. See Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A. In 2001, as part of China’s accession to the WTO, a specific textile safeguard provision was included in paragraph 242 of the Accession Report to provide temporary relief against market disruption caused or threatened by influxes of Chinese imports of textiles and apparel.

CITA helps administer the paragraph 242 safeguard in the United States under its general authority to “supervise the implementation of all textile trade agreements.” Exec. Order 11651, 37

Fed. Reg. 4699 (Mar. 3, 1972). As noted above, to aid in implementing the safeguard, CITA published procedures describing how petitions from the public for requests under the safeguard would be considered. 68 Fed. Reg. at 27,787-89. . . .

\* \* \* \*

. . . The Association's first claim is that CITA acted arbitrarily and capriciously in allegedly reinterpreting its published procedures to allow consideration of petitions based on data suggesting a threat of market disruption, rather than data describing current market disruption. It is undisputed that the petitions in question contain data suggesting only a threat of market disruption.

The Association contends that the "plain language and meaning" of the procedures requires data suggesting current market disruption, not merely a threat of market disruption. As noted above, CITA's procedures were adopted to aid in implementing textile and apparel safeguard actions under paragraph 242. 68 Fed. Reg. at 27,787. Paragraph 242 provides, in part:

In the event that a WTO Member believed that imports of Chinese origin of textiles and apparel products covered by the ATC as of the date the WTO Agreement entered into force, were, due to market disruption, threatening to impede the orderly development of trade in these products, such Member could request consultations with China with a view to easing or avoiding such market disruption. The Member requesting consultations would provide China, at the time of the request, with a detailed factual statement of reasons and justifications for its request for consultations with current data which, in the view of the requesting Member, showed: (1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption.

Accession Report at P 242(a) (emphasis added).

CITA's procedures closely mirror the language of paragraph 242. . . .

\* \* \* \*

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The primary focus of the Association's argument is on the language from the procedures—"due to market disruption, threatening to impede the orderly development of trade in these products." The Association contends that this language requires that data describing current market disruption be presented before CITA can lawfully consider whether to request consultations with China.

The Association's argument is unpersuasive because it would require us to read this language out of context. CITA's procedures and paragraph 242 both follow the disputed language with a description of the stated purpose of the paragraph 242 safeguard, which is "easing or avoiding such market disruption." 68 Fed. Reg. at 27,788; Accession Report at P 242(a). The word "avoiding" shows that current market disruption is not a prerequisite for action under either the procedures or paragraph 242 because "such market disruption" cannot be "avoided" if it has already occurred.

Moreover, the sentence in paragraph 242 containing the disputed language is immediately followed by a requirement that the entity requesting consultations provide China with a "detailed factual statement of reasons and justifications" based on "current data" that shows either "the existence *or threat* of market disruption." Accession Report at P 242(a) (emphasis added). The language "existence or threat of market disruption" provides context to the disputed language "due to market disruption, threatening to impede the orderly development of trade in these products," demonstrating that current data showing current market disruption is not required.

. . . The express purpose of the [CITA] procedures is to implement the paragraph 242 safeguard and the language "due to market disruption, threatening to impede the orderly development of trade" in the procedures is a direct quotation from paragraph 242. . . .

\* \* \* \*

To the extent that the Association is arguing that no deference should be given to CITA's current interpretation of its procedures, the argument is irrelevant because no deference is required where, as here, the procedures themselves are clear. . . .

\* \* \* \*

*(2) Termination of consideration of requests for safeguard action*

Following the U.S.-China agreement on textile trade, 4.a. *supra*, CITA terminated further consideration of requests for textile and apparel safeguard action on imports from China. 70 Fed. Reg. 71,471 (Nov. 29, 2005). The Federal Register notice explained as follows.

\* \* \* \*

Requests for China textile safeguard action based on the existence and/or threat of market disruption, on twenty-four textile and apparel product categories, were filed between November 12, 2004 and October 11, 2005, by a coalition of textile and apparel industry associations and a union representing textile and apparel industry workers. CITA accepted each of these requests for consideration and published notices in the Federal Register establishing a 30-day public comment period. . . .

The Committee's procedures state that it will make a determination within 60 calendar days of the close of the public comment period as to whether the United States will request consultations with China. The deadlines for determination on these cases range from November 30, 2005, through February 5, 2006.

On November 8, 2005, the Governments of the United States and the People's Republic of China signed a broad agreement concerning textile and apparel products. This Memorandum of Understanding was reached with a view to further developing the bilateral economic and trade relationship between the United States and China, providing the textile and apparel industries in the United States and China with a stable and predictable trading environment, and resolving trade concerns through consultations under Paragraph 242 of the Report of the Working Party for the Accession of China to the World Trade Organization. In light of the Memorandum of Understanding, and consistent with its objectives, the Committee has terminated further consideration of all textile safeguard requests that were pending on the date the Memorandum of Understanding was signed, November 8, 2005.

## 5. Trade and Investment Framework Agreement

On July 11, 2005, the United States and Iraq signed a trade and investment framework agreement ("TIFA"). A USTR press release announcing the signing of the agreement during a meeting of the U.S.-Iraq Joint Commission on Reconstruction and Economic Development in Amman, Jordan, is excerpted below. The full text of the press statement is available at [www.ustr.gov/Document\\_Library/Press\\_Releases/2005/July/Section\\_Index.html](http://www.ustr.gov/Document_Library/Press_Releases/2005/July/Section_Index.html).

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The TIFA provides a forum for Iraq and the United States to examine ways to expand bilateral trade and investment. It creates a Joint Council that will consider a wide range of commercial issues and sets out basic principles underlying the two nations' trade and investment relationship. The Council will establish a permanent dialogue with the expectation of expanding trade and investment between Iraq and the United States.

The United States has TIFAs with a number of countries to develop bilateral trade and coordinate regionally and multilaterally through regular senior level discussions on trade and economic issues.

In 2004 the U.S. exported to Iraq goods valued at \$856.5 million. In the first four months of 2005 imports increased at a rate of 150%. Imports from Iraq were valued at \$8.5 billion in 2004, mainly petroleum.

## 6. Bilateral Investment Treaties

On November 4, 2005, Assistant Secretary of State for Western Hemisphere Affairs Thomas A. Shannon and Uruguayan Foreign Minister Reinaldo Gargano signed a bilateral investment treaty at the Summit of the Americas in Mar del Plata, Argentina. A press release of that date, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/56525.htm](http://www.state.gov/r/pa/prs/ps/2005/56525.htm). The text of the U.S.-Uruguay agreement and annexes are available

at [www.state.gov/e/eb/tpp/c16209.htm](http://www.state.gov/e/eb/tpp/c16209.htm). This text reflects minor changes to the agreement signed with the prior Uruguayan administration on October 25, 2004, as discussed in *Digest 2004* at 621-22.

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The signing . . . reflects the commitment of the United States to create new economic opportunities together with those countries in the hemisphere that are willing to help themselves by implementing sound economic policies.

The agreement will provide greater confidence to U.S. and Uruguayan investors, enhancing the investment climate in a way that can contribute to economic growth and prosperity. The United States is Uruguay's largest trading partner, and the stock of U.S. foreign direct investment in Uruguay was \$533 million in 2004.

The treaty is subject to ratification by both countries. As a treaty, the BIT requires the approval of the U.S. Senate. . . .

#### **7. Overseas Private Investment Corporation: Investment Incentive Agreements**

On July 11, 2005, at a meeting of the U.S.-Iraq Joint Economic Commission in Amman, Jordan, Iraqi Finance Minister Ali Abdulameer Allawi and Ross Connelly, Acting President and CEO of the Overseas Private Investment Corporation ("OPIC"), signed an investment incentive agreement ("IIA"). As described in a press statement released by OPIC on that date, the "bilateral agreement formally open[s] all OPIC programs and services in Iraq. The agreement should pave the way for increased U.S. investment and business activities in the developing Iraqi economy." The full text of the press release is available at [www.opic.gov/news/pressreleases/2005/pro71105.asp](http://www.opic.gov/news/pressreleases/2005/pro71105.asp). The text of the Iraq IIA is available at [www.opic.gov/doingbusiness/ourwork/africa/documents/BL\\_Iraq-07-11-2005.pdf](http://www.opic.gov/doingbusiness/ourwork/africa/documents/BL_Iraq-07-11-2005.pdf); it had not entered into force at the end of 2005.

The Iraq agreement incorporated a number of revisions to the model negotiating text for IIAs that had developed

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since the model was adopted in 1977. As a result, the Iraq agreement then provided the basis for a new model IIA adopted in July 2005. A description of the history and content of the new standard IIA prepared by the OPIC Office of General Counsel, is set forth below.

The statutory basis for OPIC, created as “an agency of the United States under the policy guidance of the Secretary of State,” is provided in 22 U.S.C. § 2191 *et seq.*; for further information, *see* [www.opic.gov](http://www.opic.gov). Resolution of the Dabhol arbitration, referred to here, is discussed in Chapter 8.A.

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The United States Government (“USG”) investment guaranty programs that are now administered by the Overseas Private Investment Corporation (“OPIC”) have, since the Marshall Plan era, been conducted in accordance with agreements between the United States of America and each government that agrees to the operation of these programs in its territory. Aside from the Marshall Plan agreements, which were primarily concerned with matters other than guaranties of private investment, the USG practice had been to negotiate investment incentive agreements (“IIAs”) that dealt exclusively with its investment guaranty programs.

In July 2005, a new model agreement was approved, initially for use in negotiations with Libya but also for negotiation, renegotiation or amendment of agreements with other countries, subject to State Department concurrence in each case. The new model was based largely on the IIA negotiated with Iraq which was signed on July 11, 2005, but had not entered into force by the end of 2005.

The legislation that established OPIC includes a requirement that the President of the United States and the government of each country or area where OPIC seeks to issue insurance, guaranties or reinsurance agree to institute such a program. The legislation also requires that “suitable arrangements” exist for protection of OPIC’s interests in connection with those activities. *See* 22 U.S.C. § 2197. In practice, both requirements have been satisfied by the standard intergovernmental agreement. These agreements are officially referred to as “Investment Incentive Agreements,” although they have also been referred to as “Agreements on Investment Guaranties” and, most informally, as “OPIC Agreements.”



In 1977, a standard form of IIA was approved through the State Department's Circular 175\* process, replacing an earlier standard form that had been approved for use in 1962. The new form acknowledged that OPIC, a successor entity, or any other entity or group of entities pursuant to arrangements with OPIC, might constitute the "Issuer" of "Coverage," legally distinct from the USG. The IIA would extend to OPIC's investment insurance program against political risks and its investment guaranty program (providing USG guaranties of payment on medium and long-term loans made by U.S. lenders to eligible projects), as well as OPIC's reinsurance of other issuers. Insurance, reinsurance and guaranties were collectively defined as "Coverage."

The subject matter of the IIA included insurance, reinsurance and guaranties backed in whole or in part by credit or public monies of the United States, reflecting then ongoing consideration of the privatization of OPIC or the formation of insurance and reinsurance arrangements in which both OPIC and private companies would participate.

The provisions of the IIA applied only in respect of projects approved by the foreign government. In practice, this was understood to mean explicit approval, according to a procedure agreed upon by OPIC and each foreign government, with respect to each project, for the purpose of making Coverage subject to the provisions of the IIA. An exception from case-by-case approval was made for construction or service contracts entered into with the foreign government, which were deemed approved by the foreign government (an "automatic FGA").

The IIA allowed transfer to the Issuer of local currency, credits, assets, etc. in the event of a payment under Coverage and recognized the Issuer's succession to rights, causes of action, etc. of the

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\* Editor's note: As described on the website of the Department of State Office of the Legal Adviser, "The 'Circular 175 procedure' refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power. Specifically, the Circular 175 procedure seeks to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications, and with appropriate involvement by the State Department." See [www.state.gov/sll/treaty/c175/](http://www.state.gov/sll/treaty/c175/).

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covered investor. The Issuer's rights were to be no greater than those of the private investor, but the independent right of the United States (as distinct from the Issuer) to raise a claim under international law was preserved. The IIA affirmed that OPIC's issuance of Coverage outside the foreign country would not subject OPIC to insurance or financial regulation by the foreign government. Special provision was made for use of an intermediary to avoid any conflict between the provisions of the IIA concerning transfer of interests to the Issuer and local laws prohibiting such transfers and for treatment of local currency transferred to the Issuer. The impact of these provisions was to protect the Issuer's subrogation rights and exempt it from local money-changing laws.

Provision was made for resolution of disputes between the two governments over interpretation of the agreement or matters involving questions of public international law arising out of any project or investment for which Coverage has been issued. Such disputes were to be resolved by negotiation, but unresolved disputes could be submitted to binding arbitration by an *ad hoc* arbitral tribunal.

Essentially, the form of IIA that was formally approved in 1977 served as the foundation for negotiating subsequent IIAs. However, certain revisions were gradually made in form and substance on an *ad hoc* basis.

The FGA requirement, as a practical matter, presented operational difficulties for OPIC and investors, as it always introduced an element of delay and uncertainty. Subsequent agreements expanded the scope of the automatic FGA. Eventually, FGA procedures allowed satisfaction of the requirement by compliance with whatever approval process was required for an investment made without OPIC Coverage. Finally, beginning with the IIA that was signed with Russia in 1991, IIAs were signed that had no FGA requirement at all.

As OPIC's finance programs expanded, it became increasingly important that issues relating to that program be addressed. Taxation is the paramount issue. Assurance that OPIC and its operations are not subject to tax is important when OPIC provides financing because standard loan documentation requires the borrower to "gross up" any payment to the lender that is reduced by

taxes. . . . A provision recognizing OPIC's tax-exempt status was therefore added to the standard agreement, which already included assurances that OPIC would not be subject to regulation as a financial or insurance company. . . . In some instances, the tax issue has been left to agreements on double taxation to enable the IIA to enter into force without the legislative approval that an agreement having fiscal impact would require. The tax provision was revised from time to time to account for technical issues, such as taxing a lender indirectly by imposing withholding taxes on the borrower, and a definition of "Taxes" was added.

As to form, agreements began to be signed as a single agreement done in duplicate instead of exchanges of diplomatic notes, and their language was simplified accordingly. At the same time, complicated provisions that anticipated OPIC's privatization, which did not occur, or dealt with special situations such as local law restrictions on transfer were dropped from the standard agreement. . . .

The IIA is a statutory requirement only with respect to insurance, reinsurance and guaranties. OPIC also has statutory authority to make direct loans and grants and has been given some authority to make equity investments. These other activities were not within the scope of the IIA and did not enjoy its benefits (e.g., in the case of direct loans, the tax exemption). Accordingly, OPIC rewrote the standard agreement so that it would apply to all OPIC activities (defined as "Investment Support") instead of just Coverage (insurance, reinsurance and guaranties). As the U.S. private political risk insurance market developed, increased cooperation with private insurers again became a priority for OPIC. Therefore, the standard IIA was revised to reinstate earlier concepts of cooperation with private insurers, specifically through coinsurance, and to affirm OPIC's right to represent the interests of coinsurers as well as its own.

One revision was replacement of the President of the International Court of Justice as appointing authority in the event during an arbitration that one of the signatory governments failed to appoint an arbitrator or the two arbitrators could not agree upon a president of the tribunal. The Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID) agreed to act as appointing authority.

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Since 1971, OPIC has made 280 insurance claim settlements in the total amount of \$964.7 million. Total recoveries as of September 30, 2005 amounted to \$838.1 million, and additional recoveries are anticipated. The terms of the IIA have contributed to this impressive recovery rate. The USG's ability to use local currency acquired upon payment of inconvertibility claims has resulted in recovery of \$103,451,523 of the \$111,747,909 that OPIC has paid in settlement of those claims. The IIA's recognition of OPIC's succession to the insured investor's claims and its dispute resolution procedure have facilitated recoveries on expropriation claims. As of September 30, 2006, OPIC had realized recoveries of \$733,285,317 on expropriation claim settlements of \$820,091,543. Recoveries on expropriation claims were achieved in almost all cases by inter-governmental negotiations under the framework of the IIA.

On November 4, 2004, however, the USG for the first time invoked the arbitration procedure of the IIA with India. OPIC had been unsuccessful in negotiating a settlement of its claims as insurer and financial guarantor with respect to a power plant near Dabhol in the State of Maharashtra.

In July 2005, having just signed the recent agreement with Iraq, the Department and OPIC reviewed the form of IIA that was currently the prototype, considered the changes that had gradually been introduced since a standard IIA was last approved through the Circular 175 procedure, and revised the dispute resolution clause, among others. Then, through the Circular 175 process, they obtained approval of a new standard IIA that incorporated those changes.

The new standard IIA incorporated the departures from the 1977 model text that had been gradually introduced and informally approved since then: coverage of all OPIC programs, not just the insurance, reinsurance and guaranty programs; clarification that OPIC programs, being governmental in nature, are not subject to payment of direct or indirect taxes; clarification that OPIC is entitled to all rights and remedies to which any domestic, foreign or multilateral insurance or financial organization is entitled, although OPIC is not subject to foreign regulation; elimination of the FGA requirement; and, in form, use of a single agreement done in

duplicate and signed by both governments instead of an exchange of diplomatic notes.

The most substantive changes are in the dispute resolution provision, based both on the experience of the Dabhol arbitration and more recent U.S. treaty practice in the area of binding state-to-state arbitration, such as U.S. bilateral investment treaty practice. The relationship between negotiation and arbitration has been altered. Instead of requiring six months of negotiations, the new IIA gives either Party the right to proceed to arbitration upon 90 days notice and without any requirement to exhaust other remedies if it considers that the dispute cannot be resolved by negotiation. The new clause governs “[a]ny dispute between the Parties regarding the interpretation or application of this Agreement or regarding a claim, in connection with any project or activity for which Investment Support has been provided, for a violation of international law or for loss to the Issuer resulting from a wrongful act by [the foreign country].” This statement of the nature of disputes that are subject to the agreed procedure is clearer and broader than the formulation of the 1977 agreement (“any dispute . . . regarding the interpretation of this Agreement or which . . . involves a question of public international law arising out of any project or investment for which Coverage has been issued”). The new model IIA specifies default arbitration rules (UNCITRAL Arbitration Rules, except as modified by the Parties or this Agreement) instead of leaving formulation of rules to the arbitrators. In the Dabhol arbitration, issues arose during the selection process as to qualification and possible challenge of arbitrators, illustrating the need to have agreed rules at the commencement of an arbitral proceeding. The new IIA specifies broader bases for a decision (“this Agreement, applicable principles of international law, and, as necessary, relevant rules of applicable municipal law”) than the previous agreement (“applicable principles and rules of public international law”). It requires a reasoned award but stipulates that the award shall have no binding effect except between the Parties and in respect of the particular dispute.

## F. COMMUNICATIONS

### 1. World Summit on the Information Society

Paragraph 13 of the Plan of Action adopted at the World Summit on the Information Society ("WSIS") in 2004 requested the UN Secretary General to set up a Working Group on Internet Governance ("WGIG") to, inter alia, "identify the public policy issues that are relevant to Internet governance" and prepare a report on its work to be presented "for consideration and appropriate action for the second phase of WSIS in Tunis in 2005." On November 11, 2004, the Secretary General established the WGIG comprising 40 individuals from a wide variety of backgrounds. *See Digest 2004* at 627-31.

The report of the WGIG was released on July 18, 2005. On June 27, 2005, the Department of State published a Federal Register notice announcing the anticipated release of the report and requesting comments on the report once released. 70 Fed. Reg. 36,998 (June 27, 2005). Comments received are available at [www.state.gov/e/eb/cip/wsis2005/50315.htm](http://www.state.gov/e/eb/cip/wsis2005/50315.htm).

On June 30, 2005, in remarks to the Wireless Communications Association ("WCA"), Assistant Secretary Michael Gallagher of the National Telecommunications and Information Administration ("NTIA") of the U.S. Department of Commerce announced "U.S. principles on the Internet's Domain Name and Addressing System." The statement of principles is reproduced below and can be found at [www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples\\_06302005.htm](http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm).

The United States Government intends to preserve the security and stability of the Internet's Domain Name and Addressing System (DNS). Given the Internet's importance to the world's economy, it is essential that the underlying DNS of the Internet remain stable and secure. As such, the United States is committed to taking no action that would have the potential to adversely impact the effective and efficient operation of the DNS and will therefore maintain its historic role in authorizing changes or modifications to the authoritative root zone file.

Governments have legitimate interest in the management of their country code top level domains (ccTLD). The United States recognizes that governments have legitimate public policy and sovereignty concerns with respect to the management of their ccTLD. As such, the United States is committed to working with the international community to address these concerns, bearing in mind the fundamental need to ensure stability and security of the Internet's DNS.

ICANN is the appropriate technical manager of the Internet DNS. The United States continues to support the ongoing work of ICANN as the technical manager of the DNS and related technical operations and recognizes the progress it has made to date. The United States will continue to provide oversight so that ICANN maintains its focus and meets its core technical mission.

**Dialogue related to Internet governance should continue in relevant multiple fora.** Given the breadth of topics potentially encompassed under the rubric of Internet governance there is no one venue to appropriately address the subject in its entirety. While the United States recognizes that the current Internet system is working, we encourage an ongoing dialogue with all stakeholders around the world in the various fora as a way to facilitate discussion and to advance our shared interest in the ongoing robustness and dynamism of the Internet. In these fora, the United States will continue to support market-based approaches and private sector leadership in Internet development broadly.

On August 15, 2005, the Bureau of Economic and Business Affairs, U.S. Department of State, submitted the U.S. government's comments on the WGIG Report to the WSIS Executive Secretariat and simultaneously publicly released those comments. The full text of the comments, excerpted below, is available at [www.state.gov/e/eb/rls/othr/2005/51063.htm](http://www.state.gov/e/eb/rls/othr/2005/51063.htm).

### Introduction

The United States of America welcomes this opportunity to provide comments on the report of the United Nations Working Group on Internet Governance (WGIG). . . . The United States reiterates its commitment to the freedom of expression, to the need to preserve the security and stability of the Internet, and to infrastructure devel-



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opment. With these fundamental principles in mind, we offer a series of general comments on the report as well as specific comments on individual public policy issues referenced in the document.

### General Comments

. . . . With respect to the roles of the stakeholders identified in the report, the United States believes that, while governments naturally have a key role in the development and implementation of public policy, consultation and cooperation with the private sector and civil society are critical to ensuring effective, efficient and representative outcomes.

The United States remains open to discussing with all stakeholders ways to improve the technical efficiency as well as the transparency and openness of existing governance structures. However, it is important that the global community recognize that the existing structures have worked effectively to make the Internet the highly robust and geographically diverse medium that it is today. The security and stability of the Internet must be maintained.

The United States continues to support ubiquitous access to the Internet and the development of Internet infrastructure around the globe. Continued internationalization of the Internet is evidenced by the recent creation of Regional Internet Registries (RIRs) for Latin America and Africa and the enhanced efforts of the Internet community to work towards an equitable distribution of IP addresses. . . .

The decentralization of the Internet is further evidenced by the level of innovation that occurs at the edges of the network. It is at the edges where individuals, groups and corporations alike have the opportunity to add value to the network through pioneering applications and services. Local empowerment challenges traditional trade paradigms and reinforces the importance of all stakeholders in safeguarding the security, stability and robustness of this interconnected network of networks. . . .

Finally, the United States would like to highlight a fundamental area of public policy which is absent from the WGIG report—the role of an enabling environment in Internet development and diffusion. To maximize the economic and social benefits of the Internet, governments must focus on creating, within their own nations, the appropriate legal, regulatory, and policy environment that encour-



ages privatization, competition, and liberalization. In particular, the role of the private sector and civil society as the driver of innovation and private investment in the development of the Internet is critical. Value is added at the edges of the network, in both developed and developing countries, when the domestic policy environment encourages investment and innovation.

#### **Comments on specific Internet-related public policy issues**

*Freedom of Expression:* The United States reconfirms the importance of the fundamental right to freedom of expression and to the free flow of information as contained in Article 19 of the Universal Declaration of Human Rights, as reaffirmed in the Geneva Declaration of Principles adopted at the first phase of WSIS. A free, independent print, broadcast and online media is one of the key institutions of democratic life. The United States believes that no nation can develop politically or economically without the ability of its citizens to openly and freely express their opinions in an environment in which everyone can seek, receive and impart information. The United States fully supports the principle that all measures taken in relation to the Internet, in particular those measures taken on grounds of security or to fight crime, not lead to infringements on the freedom of expression.

*Internet Stability, Security and Cybercrime:* Building confidence and security in the use of Information and Communication Technology (ICT) systems and networks is a priority of the United States. These systems and networks are subject to threats and vulnerabilities from multiple sources and different geographic locations; security requires a concerted preventive effort by all stakeholders, appropriate to their roles. National action and international collaboration across a range of legal, enforcement, administrative and technical areas are required to build a global culture of cybersecurity. In developing a national cybersecurity strategy, governments should draw upon existing structures and processes such as: the Council of Europe Convention on Cybercrime, UNGA Resolutions “Combating the criminal misuse of information technologies” (55/63 and 56/121) and “Creation of a Global Culture of Cybersecurity” (57/239), and actions taken by computer security incident response teams (CSIRTs).

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*The Internet Domain Name and Addressing System:* The United States continues to support the private sector led technical coordination and management of the Internet's domain name and addressing system (DNS) in the form of the Internet Corporation for Assigned Names and Numbers (ICANN), with government advice on DNS issues provided by the Government Advisory Committee (GAC). We also recognize that governments have legitimate public policy and sovereignty concerns with respect to the management of their country code top level domains (ccTLD) and the United States is committed to working with the international community to address these concerns, bearing in mind the fundamental need to ensure stability and security of the Internet's DNS. With respect to international coordination of the DNS, WSIS should recognize the role of existing institutions, encourage effective, bottom up decision making at the local level, the continued deployment of mirror roots and responsible address allocation policies.

*Multilingualism:* The United States believes that the development of technologies that facilitate the use of domain names in languages other than Latin based character sets is an important step in making the Internet truly global. WSIS should encourage continued work and collaboration on internationalized domain names by existing standards bodies and processes by which agreement can be reached on appropriate language tables.

*Interconnection Costs:* The United States believes that arrangements for international Internet connections should continue to be the subject of private, commercial negotiations. The international settlement regime that applies under the telecommunications regime cannot be applied to Internet traffic. WSIS should look to ongoing work on this important topic in existing institutions, such as the ITU and the OECD, and encourage national authorities to take steps to open markets to competitive entry and promote increased competition in the market place. A competitive market creates an enabling environment that encourages investment and/or international infrastructure assistance. The development of regional Internet Exchange Points and local content should also be encouraged.

*Intellectual Property Rights:* The United States attaches great importance to a comprehensive, effective and properly enforced intellectual property system and believes that any Information Society

envisioned by the WSIS must clearly and explicitly recognize that such a system is essential to the Information Society because it creates an incentive for creativity and innovation. To that end, WSIS and its documents must recognize, respect and support the existing international intellectual property system. The balance between owners and users of intellectual property is an important underpinning of an effective intellectual property system. Existing international intellectual property agreements encompass and reflect the balance between owners and users of intellectual property. Indeed, this balance is struck so that intellectual property owners are encouraged to develop and disseminate their works and inventions to the public for use and enjoyment. The United States believes that the appropriate United Nations forum for dealing with intellectual property issues is the World Intellectual Property Organization (WIPO), which has regularly examined the interaction of cyberspace and intellectual property since the early days of the Internet.

*Spam:* Increasingly, spam is, in large part, a security issue: spam is one way in which viruses and other security threats can be delivered to computers. Industry must play a lead role in developing technical tools to address this problem. In addition, many of these security threats often result from criminal conduct. The Convention on Cybercrime provides a comprehensive framework to address these threats. In 2003, the United States enacted an anti-spam law [that] established a framework of civil and criminal enforcement tools to help America's consumers, businesses, and families combat unsolicited commercial e-mail. However, the United States does not believe that the statute alone will solve spam. The United States approach to combating spam relies on a combination of legal tools for effective law enforcement, development and deployment of technology tools and best practices by the private sector, and consumer and business education. We believe that work undertaken to combat spam should ensure that email continues to be a viable and valuable means of communication. Governments have a role to play in educating consumers and enforcing spam laws. To this end, governments should encourage spam enforcement agencies to join the London Action Plan on international spam enforcement cooperation.

*Data Protection and Privacy:* The United States appreciates the concerns expressed in the report on data protection and privacy. Protecting the privacy of individuals' sensitive personal information is a priority for the United States government and for United States consumers. Companies have an important role to play by implementing reasonable safeguards to protect sensitive consumer data. The United States also believes that multilateral and private-sector initiatives have a strong and important role to play in encouraging the development and use of privacy-enhancing technologies and in promoting consumer education and awareness about online privacy issues. A deliberate and balanced approach to privacy that is open to innovations offers the best environment for Internet expansion. Any effective approach to ensuring protection of personal information includes: appropriate laws to protect consumer privacy in highly sensitive areas such as financial, medical, and children's privacy; government enforcement of these laws; and encouragement of private sector efforts to protect consumer privacy.

*Consumer Protection:* The United States believes that a vigorous, competitive electronic marketplace benefits consumers. Consumer protection policy should ensure that consumers can make well-informed decisions about their choices in this marketplace and that sellers will fulfill their promises by the products they offer. To this end, governments should protect consumers by: (1) enforcing laws against practices that harm consumers; (2) disseminating information and educating consumers; and (3) encouraging private sector leadership to develop codes of conduct and to provide easy-to-use alternative dispute resolution mechanisms for addressing consumer complaints. These principles are expressed in various existing international guidelines for consumer protection, including the United Nations Guidelines on Consumer Protection, the OECD Guidelines for Consumer Protection in Electronic Commerce, and the APEC Consumer Protection Principles.

*Human Capacity Building:* The United States believes that each person should have the opportunity to acquire the necessary skills and knowledge in order to understand, participate actively in, and benefit fully from, the Information Society and the knowledge economy. This requires increased capacity building in the areas of ICT policy and regulation, technology knowhow, access to infor-

mation, and the application of ICT to various development sectors. WSIS should support the continuing work of multiple stakeholders to build capacity of professionals and institutions in developing nations and to ensure the efforts are both technically innovative and supportive of market-based approaches.

*Meaningful Participation in Global Public Policy Development:* The United States encourages the participation of developing countries in ICT forums as a complement to national development efforts related to ICTs. As such, it is important to develop the capacity of government officials and other stakeholders who can address the complicated issues and difficult choices raised by the evolving ICT environment. Through the U.S. Telecommunications Training Institute (USTTI), the United States, together with U.S. industry, has demonstrated its commitment to capacity building by providing tuition free training courses for policy makers around the world in the telecommunications, broadcast and ICT-related fields.

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The second phase of the WSIS met in Tunis, Tunisia, from November 16-18, 2005. At that meeting, the Summit adopted the Tunis Commitment and the Tunis Agenda for the Information Society. See [www.state.gov/e/eb/cip/wsisis2005/c12672.htm](http://www.state.gov/e/eb/cip/wsisis2005/c12672.htm) for further information, including links to the texts of the two instruments. The Internet Governance portion of the Tunis Agenda (paragraphs 29-82), inter alia, (1) "recognized that the existing arrangements for Internet governance have worked effectively to make the Internet the highly robust, dynamic and geographically diverse medium that it is today, with the private sector taking the lead in day-to-day operations, and with innovation and value created at the edges," (2) acknowledged that the "stability and security of the Internet must be maintained," and (3) invited the UN Secretary General to convene a new forum for a multi-stakeholder policy dialogue in 2006, to be called the "Internet Governance Forum," to discuss public policy issues related to key elements of Internet governance. The Tunis documents essentially preserved the existing role of the U.S. entity Internet Corporation for Assigned Names and Numbers ("ICANN")

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that manages the Internet Domain Name and Addressing System ("DNS"), discussed above. For more information on management of the DNS, see [www.ntia.doc.gov/ntiahome/domainname/domainhome.htm](http://www.ntia.doc.gov/ntiahome/domainname/domainhome.htm).

On November 18, 2005, the closing day of the Tunis Summit, Dr. John Marburger, Director, Office of Science and Technology Policy, Executive Office of the President, addressed the WSIS plenary, as excerpted below. The full text of Dr. Marburger's statement is available at [www.state.gov/e/eb/rls/rm/2005/57996.htm](http://www.state.gov/e/eb/rls/rm/2005/57996.htm).

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It is important to recognize. . . that existing structures have worked effectively to make the Internet the highly robust and geographically diverse medium that it is today. Continuing progress requires sustaining the enabling environment that has brought the world such benefits. This implies supporting private sector investment and innovation, avoiding burdensome regulation, preserving the stability and security of the networks, and embracing the global collaborative and cooperative nature of the network.

The United States remains committed to these principles, and aims to protect the current open governance structure that has brought the Internet such success. We take seriously, as all of us should, our responsibility to do no harm to a system that is working so well.

Phase I of this Summit produced a Declaration of Principles that was our shared focus on the ability of all peoples to access information through the reaffirmation of the right of freedom of opinion and expression.

It is vital that the Internet remain a neutral medium open to all in order to realize that access for our citizens. It is the role of governments to ensure that this freedom of expression is available to its citizens and not to stand in the way of people seeking to send and receive information across the Internet.

It is first and foremost the responsibility of governments to ensure that their domestic policies foster an environment for the de-

ployment of the Internet by industry and the ability of their citizens to access and use this technology.

This phase of the World Summit on the Information Society provided the world with an opportunity to discuss these issues, and we hope that its successful outcome will provide additional incentive to our host, the government of Tunisia, to match its considerable economic and social accomplishments with comparable progress in political reform and respect for the human rights of its people.

\* \* \* \*

## **2. International Telecommunication Union**

On April 20, 2005, U.S. Advisor David A. Traystman exercised the U.S. right of reply to a statement by Cuba at the twenty-seventh session of the UN Committee on Information concerning obligations under the International Telecommunication Union, stating: "The United States Government takes seriously its international obligations, particularly those of the International Telecommunication Union ("ITU") concerning avoidance of harmful interference to the services of other countries." The full text of Mr. Traystman's remarks is available at [www.un.int/usa/05dto420.htm](http://www.un.int/usa/05dto420.htm).

## **G. OTHER ISSUES**

### **1. Cuban Trademark Litigation in the United States**

On February 24, 2005, the U.S. Court of Appeals for the Second Circuit reversed a district court judgment and permanent injunction based on a finding of trademark infringement in favor of a Cuban tobacco company. *Empresa Cubana del Tabaco v. Culbro Corp.*, 399 F.3d 462 (2d Cir. 2005). The court of appeals described the background of the case as follows:

This appeal arises from a dispute between [Empresa Cubana del Tabaco doing business as Cubatabaco ("Cubatabaco")], a Cuban company, and General Cigar, an American company, over who has the right to use the COHIBA mark on cigars. After filing an application to reg-

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ister the COHIBA mark in Cuba in 1969, Cubatabaco began selling COHIBA cigars in Cuba. Cubatabaco has sold COHIBA cigars outside of Cuba since 1982, but, because of the United States embargo against Cuban goods, imposed in 1963, Cubatabaco has never sold COHIBA cigars in the United States. General Cigar obtained a registration for the COHIBA mark in the United States in 1981 and sold COHIBA cigars in the United States from 1978 until late 1987. In 1992, General Cigar relaunched a COHIBA cigar in the United States and has sold cigars under that mark in the United States since that time.

Cubatabaco claims that it owns the U.S. COHIBA trademark because General Cigar abandoned its 1981 registration in 1987 and that, by the time General Cigar resumed use of the mark in 1992, the Cuban COHIBA mark was sufficiently well known in the United States that it deserved protection under the so-called “famous marks doctrine.” The District Court agreed and found that, although Cubatabaco had never used the mark in the United States and was prohibited from doing so under the embargo, it nonetheless owned the U.S. COHIBA mark. . . . [T]he court granted judgment to Cubatabaco on its claim for trademark infringement under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), cancelled General Cigar’s registration of the mark, and enjoined General Cigar from using the mark. The court dismissed all other claims brought by Cubatabaco, including claims under international trademark treaties and New York law.

At the invitation of the court of appeals, the United States filed a letter brief in November 2004 arguing that the Cuban embargo bars Cubatabaco’s acquisition of the COHIBA mark through the famous marks doctrine but that the Cuban Assets Control Regulations did not prohibit the district court’s order canceling General Cigar’s registration and enjoining its use of the COHIBA mark; *see Digest 2004* at 663-70. The Second Circuit agreed that the embargo precluded Cubatabaco’s acquisition of the COHIBA mark, but reversed the district



court's grant of relief to Cubatabaco. The court affirmed the district court's dismissal of all other claims.

Excerpts below address the appellate court's conclusion that no relief was available to Cubatabaco because the embargo and the implementing regulations prohibit transfer of property rights (footnotes and references to other filings in the case omitted). Because it decided that Cubatabaco could not acquire a trademark in the United States, the court "did not reach the question of whether an entity that has not used a mark on products sold in the United States can nonetheless acquire a U.S. trademark through operation of the famous marks doctrine."

At the end of 2005 a petition for a writ of certiorari was pending with the Supreme Court.

\* \* \* \*

*[I.]A. The Trademark Infringement Claim Fails Because Acquisition of the Mark Via the Famous Marks Doctrine Is Prohibited By the Embargo Regulations*

\* \* \* \*

*1. The Embargo Regulations*

Unless otherwise authorized, the [U.S. Cuban Assets Control Regulations, 31 C.F.R. § 551.201 *et seq* ("Embargo Regulations")], prohibit a broad range of transactions involving property in which a Cuban entity has an interest. . . .

We hold that Cubatabaco's acquisition of the U.S. COHIBA mark through the famous marks doctrine would constitute a transfer that is prohibited by § 515.201(b) and such transfers are not authorized by a general or specific license.

\* \* \* \*

*a. General Prohibition: 515.201(b)*

Cubatabaco's acquisition of the U.S. COHIBA mark through the famous marks doctrine is barred by 31 C.F.R. § 515.201(b)(2), which prohibits "transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the

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United States” if the transfer involves property in which a Cuban entity has an interest. 31 C.F.R. § 515.201(b)(2).

A transaction involving property in which a Cuban entity has an interest includes a transfer of property to a Cuban entity. “Property” includes trademarks, *id.* § 515.311, and “transfers outside the United States” of United States trademark rights to Cuban entities are prohibited by § 515.201(b)(2). “Transfer” is broadly defined to include “any . . . act . . . the . . . effect of which is to create . . . any right, remedy, power, privilege, or interest with respect to property.” *Id.* § 515.310. Cubatabaco’s acquisition of the mark is a “transfer[] outside the United States with regard to any property or property interest subject to the jurisdiction of the United States,” *id.* § 515.201(b)(2), because Cubatabaco’s acquisition of the mark is a transfer of U.S. property rights from inside the United States to Cuba—a location “outside of the United States.” Therefore, Cubatabaco’s acquisition of the U.S. COHIBA mark through the famous marks doctrine is barred by § 515.201(b)(2).

Cubatabaco argues that the Embargo Regulations “regulate[] *transactions* involving property in which a Cuban national has, or had, an interest, *not* their legal effect.” In other words, Cubatabaco claims that if the acts that made the Cuban COHIBA famous were permitted under the Regulations, Cubatabaco’s acquisition of the mark through operation of the famous marks doctrine is permitted. We reject this argument because there is no doubt that acquisition of property through operation of law is covered by § 515.201(b). As the government asserts, “regardless of whether the acquisition of the COHIBA mark through the famous marks doctrine is characterized as an ‘effect’ of other actions or not, it nevertheless falls within the Regulations’ definition of a ‘transaction’ involving property in which a Cuban national has an interest.” The Regulations explicitly permit specific “transfers by operation of law,” including “any transfer to any person by intestate succession,” 31 C.F.R. § 515.525(a)(2), and transfers arising “solely as a consequence of the existence or change of marital status,” *id.* § 515.525(a)(1). These provisions would not be necessary if § 515.201’s prohibitions did not cover transfers by operation of law.

Our conclusion is consistent with the views expressed by the United States in its *amicus curiae* brief. The United States concludes

that “under the plain language of these regulations, the acquisition of the trademark by Cubatabaco in 1992 through the famous marks doctrine, as found by the district court, created or vested a property right in Cubatabaco, and was therefore prohibited absent a general or specific license.” *Amicus Curiae* Br. at 7. Because we conclude that § 515.201(b)(2) clearly bars Cubatabaco’s acquisition of the COHIBA mark through the famous marks doctrine, we need not determine what level of deference is owed to the U.S. Department of Treasury’s interpretation of the Embargo Regulations. *Cf. Havana Club [Holding, S.A. v. Galleon S.A., 203 F.3d 116 (2d Cir. 2000)]* (noting that the interpretation of a provision of the Embargo Regulations “given by the agency charged with enforcing the embargo is normally controlling”).

\* \* \* \*

Because the acquisition of the U.S. COHIBA mark by Cubatabaco through the famous marks doctrine is a prohibited transfer under § 5115.201, it is barred unless authorized by a general or specific license [and no license issued by OFAC to Cubatabaco provides such authorization.]

\* \* \* \*

***B. Cubatabaco’s Claims for Injunctive Relief Based on Section 43(a) and the Paris Convention Fail Because They Entail a Transfer of Property Rights to Cubatabaco in Violation of the Embargo***

Cubatabaco argues that even if the Regulations bar its acquisition of the U.S. COHIBA mark, it is entitled to obtain cancellation of General Cigar’s registration of the COHIBA mark and an injunction preventing General Cigar from using the mark in the United States because its mark was famous in the United States before General Cigar recommenced its use in November 1992. Cubatabaco maintains that this relief is warranted under Section 43(a) of the Lanham Act, as well as under Article 6 *bis* of the Paris Convention, which it claims is implemented by Sections 44(b) and (h) of the Lanham Act even if full transfer of the COHIBA mark to Cubatabaco is prohibited.

As an initial matter, we find that granting Cubatabaco the injunctive relief sought would effect a transfer of property rights to a Cuban entity in violation of the embargo. There is no contest that, as matters stand, General Cigar has the full panel of property rights in the COHIBA mark, including the right to exclude or limit others seeking to use the mark in the United States. Invoking Sections 43(a), 44(b), and 44(h) of the Lanham Act and treaty duties owed by a state party to the Paris Convention, Cubatabaco seeks to exclude General Cigar from commercial use of the COHIBA mark in the United States. There is no doubt that granting this relief to Cubatabaco would entail a transfer from General Cigar to Cubatabaco of a “right, remedy, power, privilege, or interest with respect to [the COHIBA mark].” 31 C.F.R. § 515.310. As it is exactly this brand of property right transfer that the embargo prohibits, we cannot sanction a grant of injunctive remedy to Cubatabaco in the form of the right, privilege, and power to exclude General Cigar from using its duly registered mark. As described below, this limitation on judicial authority applies equally to Cubatabaco’s Lanham Act and Paris Convention claims.

Adopting the views set forth in the *amicus curiae* brief filed by the United States, Cubatabaco argues that even if General Cigar owns the COHIBA mark in the United States, Cubatabaco can prevail in a Section 43(a) claim against General Cigar on the theory that General Cigar’s use of the COHIBA mark in the United States causes consumer confusion. In support of this argument, Cubatabaco argues that Section 43(a) “goes beyond trademark protection.”

\* \* \* \*

Cubatabaco’s theory is that General Cigar’s sale of COHIBA cigars in the United States violates Section 43(a) because it is likely to cause consumer confusion as to the source or attribution of those cigars. The confusion alleged by Cubatabaco in support of its Section 43(a) claim is derived solely from General Cigar’s use of the COHIBA mark: Cubatabaco cannot obtain relief on a theory that General Cigar’s use of the mark causes confusion, because, pursuant to our holding today, General Cigar’s legal right to the COHIBA mark has been established as against Cubatabaco. Gen-

eral Cigar has a right to use the mark in the United States because it owns the mark in the United States.

In Part IA of this opinion we held that General Cigar has priority rights to the COHIBA mark in the United States as against Cubatabaco. . . . To allow Cubatabaco to prevail on a claim of unfair competition against General Cigar and to obtain an injunction prohibiting General Cigar from using the mark would turn the law of trademark on its head. None of United States law, the facts in this case, or international treaties warrants such acrobatics in this case. We therefore find that, on the facts of this case, Cubatabaco's Section 43(a) claim seeking an injunction against General Cigar's use of its duly registered COHIBA mark cannot succeed as a matter of law.

\* \* \* \*

## *2. Article 6bis Paris Convention*

Cubatabaco maintains that even if the Regulations bar its acquisition of the mark, and even if it cannot obtain relief for an unfair competition claim under Section 43(a), it has a right under Article 6 bis of the Paris Convention, in conjunction with Sections 44(b) and (h) of the Lanham Act, to obtain cancellation of General Cigar's mark and an injunction against its use.

Article 6 *bis* of the Paris Convention provides that:

(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

\* \* \* \*

Paris Convention, Art. 6 *bis*, 21 U.S.T. at 1640.

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Both the United States and Cuba are parties to the Paris Convention. *Id.* at 1669, 1676.

According to Cubatabaco, Sections 44(b) and (h) incorporate treaty provisions relating to the “repression of unfair competition,” and rights under Article 6 *bis* fall into that category. Section 44(b) provides that:

Any person whose country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law, shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this chapter.

15 U.S.C. § 1126(b). Therefore, Cubatabaco is entitled to the benefits of Section 44, “under the conditions expressed herein,” but only to the extent necessary to give effect to any provision of a treaty. Section 44(h) provides:

Any person designated in subsection (b) of this section as entitled to the benefits and subject to the provisions of this chapter shall be entitled to effective protection against unfair competition, and the remedies provided in this chapter for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.

*Id.* § 1126(h). “Rights under Section 44(h) are co-extensive with treaty rights under section 44(b), including treaty rights ‘relating to . . . the repression of unfair competition.’” *Havana Club*, 203 F.3d at 134 (quoting 15 U.S.C. § 1126(b)). . . .

Cubatabaco may be correct that Sections 44(b) and (h) incorporate Article 6 *bis* and allow foreign entities to acquire U.S. trademark rights in the United States if their marks are sufficiently famous in the United States before they are used in this country. That is the view expressed by some commentators. . . .

However, we need not decide that broad question here because even assuming that the famous marks doctrine is otherwise viable and applicable, the embargo bars Cubatabaco from acquiring property rights in the U.S. COHIBA mark through the doctrine. The Embargo Regulations do not permit Cubatabaco to acquire the power to exclude General Cigar from using the mark in the United States. We do not read Article 6 *bis* and Section 44(b) and (h) of the Lanham Act to require cancellation of General Cigar's properly registered trademark or an injunction against its use of the mark in the United States under these circumstances.

\* \* \* \*

## **2. Tax Treaties**

During 2005 President Bush transmitted four tax treaties to the Senate for advice and consent to ratification:

- Protocol Amending the Tax Convention with France (S. Treaty No. 109-4) and Protocol Amending Tax Convention on Inheritances with France (S. Treaty No. 109-7);
- Protocol Amending the Convention with Sweden on Taxes on Income (S. Treaty No. 109-8 (2005)); and
- Tax Convention with Bangladesh (S. Treaty No. 109-5 (2005)).

The treaties were awaiting Senate approval at the end of 2005.

## **3. Millennium Challenge Corporation**

On January 23, 2004, President Bush signed into law the Millennium Challenge Act of 2003, Div. D, Title VI of Pub. L. 108-199, 118 Stat. 211 (2004) ("MCA"). The purposes of the MCA are set forth in § 602:

- (1) to provide assistance for global development through the Millennium Challenge Corporation, as described in section 604; and
- (2) to provide such assistance in a manner that promotes economic growth and the elimination of extreme poverty and strengthens good governance, economic freedom, and investments in people.

The Millennium Challenge Corporation (“MCC”) is established under § 604 as a government corporation in the executive branch. Under § 609 assistance may be made available to an eligible country (designated pursuant to § 607) only “if the country enters into an agreement with the United States, to be known as a ‘Millennium Challenge Compact,’ that establishes a multi-year plan for achieving shared development objectives in furtherance of the purposes of this title.” Section 609(b) provides that the compact “should take into account the national development strategy of the eligible country” and lists specific elements to be contained in the compact.

For fiscal year 2005 seventeen countries were eligible to apply for MCA assistance and thirteen countries were selected to participate in the MCA Threshold Program. During fiscal year 2005 the MCC completed and signed compacts with its first five partner countries: Madagascar (April 18, 2005), Honduras (June 13, 2005), Cape Verde (July 4, 2005), Nicaragua (July 14, 2005), and Georgia (September 12, 2005), and the Board of Directors approved a threshold agreement with Burkina Faso on July 8, 2005.

On November 8, 2005, twenty-three countries were selected to be eligible to submit proposals for MCA assistance for fiscal year 2006 and thirteen countries to participate in the fiscal year 2006 MCA Threshold Program. *See* press releases at [www.mca.gov/public\\_affairs/press\\_releases/pr\\_110805\\_fyo6\\_select.shtml](http://www.mca.gov/public_affairs/press_releases/pr_110805_fyo6_select.shtml) and [www.mca.gov/countries/threshold/index.shtml](http://www.mca.gov/countries/threshold/index.shtml). The Fiscal Year 2006 Congressional Budget Justification submitted to Congress in 2005 described the Threshold Country Program and Millennium Challenge Compacts as excerpted below. The full text of the budget justification is available at [www.mca.gov/about\\_us/key\\_documents/FYo6\\_Budget\\_Justification.pdf](http://www.mca.gov/about_us/key_documents/FYo6_Budget_Justification.pdf). For further information on the MCC, *see* [www.mca.gov](http://www.mca.gov).

\* \* \* \*



### Threshold Country Program

The Threshold Program was established to assist countries that do not qualify for MCA assistance but are close to qualifying and have demonstrated a commitment to meeting the MCA eligibility requirements in the future. The program is directed toward helping such countries improve their performance on the specific policy weaknesses indicated by the country's scores on the sixteen policy indicators that are critical to MCA eligibility and methodology. Threshold funds are then used to support reform efforts and to provide an incentive to move a potential partner country toward MCA eligibility. However, selection for the Threshold Program does not ensure eventual MCA eligibility. In selecting Threshold Program participants for FY 2004 and FY 2005, the Board considered countries that had to improve their performance on no more than two indicators to qualify for Threshold eligibility. In cooperation with USAID, MCC is working with thirteen Threshold countries (see country list at Annex B) to design programs.

\* \* \* \*

### Exhibit A

#### Millennium Challenge Compacts

Each country that is selected for MCA funding will negotiate and sign a public Millennium Challenge Compact with MCC. Each Compact will include, among other things: a limited number of specific objectives that the country and the U.S. expect to achieve during the Compact term; regular benchmarks to measure progress towards achieving the objectives; the responsibilities of the U.S. and the country in achieving the objectives; identification of intended beneficiaries; a multi-year financial plan; a description, where appropriate, of the participation of other donors; a plan to ensure fiscal accountability for the use of assistance; a requirement for fair and transparent procurement and a process, where appropriate, for consideration of solicited and unsolicited proposals under the Compact; and the strategy of the country to sustain progress made towards achieving the objectives of the Compact after the end of the Compact Term. Compacts will also include clear targets with which to measure results. MCC wants to ensure that U.S. taxpayer money is invested in those programs where MCC be-

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lieves funding will lead to poverty reduction and economic growth. Targets will also ensure that both MCC and the country are accountable for the success of the Compact.

The agreement gives the country ownership of the activities and programs funded by MCA assistance, reflects wider participation by that country's civil society and other non-governmental groups, and is expected to encourage a stronger commitment on the part of that country to achieve results. This approach also imposes only a reasonable administrative and reporting burden on the part of the partner country.

\* \* \* \*

### Cross References

*Restrictions on trade related to certain marine wildlife*, Chapter 13.A.2.c.(4) and (6).

*Trade issues in Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Chapter 14.C.1.

*Private international commercial law*, Chapter 15.A.

*International civil litigation in U.S. courts*, Chapter 15.D.

*Economic sanctions*, Chapter 16.

## CHAPTER 12

### Territorial Regimes and Related Issues

#### A. LAW OF THE SEA AND RELATED ISSUES

##### 1. UN Convention on the Law of the Sea

On January 18 and 19, 2005, the Senate Foreign Relations Committee ("SFRC") conducted confirmation hearings on the nomination of then National Security Advisor Condoleezza Rice to become Secretary of State, an office she assumed on January 26, 2005. In response to a question from Chairman Richard G. Lugar, Dr. Rice confirmed that the Bush Administration strongly urged early Senate action to approve the 1982 United Nations Convention on the Law of the Sea ("Convention") and the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("1994 Agreement" or "Implementing Agreement"), stating:

The Administration strongly supports early Senate action on the Convention.

The Administration urges the Senate Foreign Relations Committee to again favorably report out the Convention and Implementing Agreement, with the Resolution of advice and Consent to Ratification as reported by the Committee last March. . . .

The SFRC had reported the Convention and the 1994 Agreement to the full Senate recommending advice and consent to accession and ratification, respectively, in March 2004 (S.

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Exec. Rep. No. 108-10 (2004)); they were returned to the SFRC at the end of the 108th Congress, however, because the Senate had taken no action; *see Digest 2004* at 671-96, *Digest 2003* at 715-54.

Excerpts follow from the written exchange between Senator Lugar and Dr. Rice submitted prior to the hearing. The full text of the questions and answers is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

Question:

2. I was pleased to see in the U.S. Ocean Action Plan that he submitted to the Congress on December 17, the President states that “as a matter of national security, economic self-interest, and international leadership, the administration is strongly committed to U.S. accession to the UN Convention on the Law of the Sea.” Can you cite specific benefits that accession will have for U.S. national security?

Answer:

Joining the Convention will advance the interests of the U.S. military.

As the world’s leading maritime power, the United States benefits more than any other nation from the navigation provisions of the Convention.

Those provisions, which establish international consensus on the extent of jurisdiction that States may exercise off their coasts, preserve and elaborate the rights of the U.S. military to use the world’s oceans to meet national security requirements.

They achieve this, among other things:

- by stabilizing the outer limit of the territorial sea at 12 nautical miles;
- by setting forth the navigation regime of innocent passage for all ships in the territorial sea, through an exhaustive and objective list of activities that are inconsistent with innocent passage—an improvement over the subjective language in the

1958 Convention on the Territorial Sea and Contiguous Zone;

- by protecting the right of passage for all ships and aircraft, through, under, and over straits used for international navigation, as well as archipelagoes;
- by reaffirming the traditional freedoms of navigation and overflight in the exclusive economic zone and the high seas beyond; and
- by providing for the laying and maintenance of submarine cables and pipelines.

U.S. Armed Forces rely on these navigation and overflight rights daily, and their protection is of paramount importance to U.S. national security.

We run the very real risk as a non-party of allowing the hard-fought and favorable national security provisions of the Convention to be eroded.

The choice is whether, in the face of increasing coastal State pressures to constrain freedom of navigation, the United States is in a better position to protect its interests from inside the treaty or outside.

The answer to that question is clear.

We should be inside the treaty as soon as possible.

Becoming a party to the Convention would strengthen our ability to deflect potential proposals that would be inconsistent with U.S. national security interests, including those affecting freedom of navigation.

Question:

3. Support for U.S. accession to the Law of the Sea Convention has been expressed by U.S. companies and industry groups whose businesses depend on the oceans. These include the American Petroleum Institute, the U.S. Oil and Gas Association, the Chamber of Shipping of America, the U.S. Tuna Foundation, the American Chemistry Council, the National Oceans Industries Association, and the U.S. Council for International Business. Do you agree with these U.S. companies that acceding to the Law of the Sea Convention will advance U.S. economic interests and benefit American businesses?

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### Answer:

Yes. The United States, as the country with the longest coastline and the largest exclusive economic zone, will gain economic and resource benefits from the Convention:

- The Convention accords the coastal State sovereign rights over non-living resources, including oil and gas, found in the seabed and subsoil of its continental shelf.
- The Convention improves on the 1958 Continental Shelf Convention, to which the United States is a party, in several ways:
  - by replacing the “exploitability” standard with an automatic continental shelf out to 200 nautical miles, regardless of geology;
  - by allowing for extension of the shelf beyond 200 miles if it meets certain geological criteria; and
  - by establishing an institution that can promote the legal certainty sought by U.S. companies concerning the outer limits of the continental shelf.

Concerning mineral resources beyond national jurisdiction, i.e., not subject to the sovereignty of the United States or any other country, the 1994 Agreement meets our goal of guaranteed access by U.S. industry on the basis of reasonable terms and conditions.

Joining the Convention would facilitate deep seabed mining activities of U.S. companies, which require legal certainty to carry out such activities in areas beyond U.S. jurisdiction.

The Convention also accords the coastal State sovereign rights over living marine resources, including fisheries, in its exclusive economic zone, i.e., out to 200 nautical miles from shore.

The Convention protects the freedom to lay submarine cables and pipelines, whether military, commercial, or research.

In addition, the Convention establishes a legal framework for the protection and preservation of the marine environment from a variety of sources, including pollution from vessels, seabed activities, and ocean dumping.

The provisions effectively balance the interests of States in protecting the environment and natural resources with their interests in freedom of navigation and communication.

With the majority of Americans living in coastal areas, and U.S. coastal areas and EEZ generating vital economic activities, the United States has a strong interest in these aspects of the Convention.

Question:

4. It is my understanding that it has been U.S. policy since President Reagan's 1983 Statement of Ocean Policy that the United States, including the U.S. military, will act in accordance with the Law of the Sea Convention's provisions relating to the traditional uses of the oceans. Would acceding to the Law of the Sea Convention require the United States military to make any changes in its existing policies or procedures with respect to the use of the oceans to conduct military operations?

Answer:

No.

As the Chief of Naval Operations, Admiral Vern Clark, testified before the Senate Armed Services Committee on April 8, 2004, "I am convinced that joining the Law of the Sea Convention will have no adverse effect on our operations . . . , but rather, will support and enhance ongoing U.S. military operations, including continued prosecution of the global war on terrorism."

The Vice Chief of Naval Operations, Admiral Mike Mullen, testified before the House International Relations Committee on May 12, 2004, that the Navy "currently operate[s]—willingly because it is our national security interests—within the provisions of the Law of the Sea Convention in every area related to navigation. We would never recommend an international commitment that would require us to get a permission slip—from anyone—to conduct our operations." Admiral Mullen concluded his oral statement by emphasizing, "Simply, the Convention does not require a permission slip or prohibit these activities; we would continue operating our military forces as we do today."

Question:

5. . . . Do you believe that acceding to the Law of the Sea Convention will in any way diminish the ability of the United States to take necessary action to prevent the transport of weapons of mass destruction?

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Answer:

No.

The Convention's navigation provisions derive from the 1958 law of the sea conventions, to which the United States is a party, and also reflect customary international law accepted by the United States. As such, the Convention will not affect applicable maritime law or policy regarding interdiction of weapons of mass destruction.

Like the 1958 conventions, the LOS Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction:

- exclusive port and coastal State jurisdiction in internal waters and national airspace;
- coastal State jurisdiction in the territorial sea and contiguous zone;
- exclusive flag State jurisdiction over vessels on the high seas (which the flag State may, either by general agreement in advance or approval in response to a specific request, waive in favor of other States); and
- universal jurisdiction over stateless vessels.

Nothing in the Convention impairs the inherent right of individual or collective self-defense (a point which is reaffirmed in the Resolution of Advice and Consent proposed in the last Congress).

Question:

6. . . . In your view, will acceding to the Convention inhibit the United States and its partners from successfully pursuing the PSI?

Answer:

No.

PSI requires participating countries to act consistent with national legal authorities and "relevant international law and frameworks," which includes the law reflected in the Law of the Sea Convention.

The Convention's navigation provisions derive from the 1958 law of the sea conventions, to which the United States is a party, and also reflect customary international law accepted by the United States.

As such, the Convention will not affect applicable maritime law or policy regarding interdiction of weapons of mass destruction,



their means of delivery, and related materials. Like the 1958 conventions, the LOS Convention recognizes numerous legal bases for taking enforcement action against vessels and aircraft suspected of engaging in proliferation of weapons of mass destruction [as enumerated in the answer to question 5 above]. . . .

Question:

7. . . . Please explain what role, if any, the United Nations would have in regulating uses of the oceans by the United States if the United States were to accede to the Law of the Sea Convention.

Answer:

The United Nations has no decision-making role under the Convention in regulating uses of the oceans by any State Party to the Convention.

Commentators who have made this assertion have argued that the International Seabed Authority (ISA) somehow has regulatory power over all activities in the oceans.

That is completely false. The authority of the ISA is limited to administering the exploration and exploitation of minerals in areas of deep seabed beyond national jurisdiction, generally more than 200 miles from shore. The ISA has no other role and has no general regulatory authority over the uses of the oceans, including freedom of navigation and oversight.

Question:

8. . . . In your view, is there any basis for concern that U.S. accession to the Law of the Sea Convention will result in U.S. citizens being subject to taxation by the International Seabed Authority?

Answer:

No. The Convention does not provide for or authorize taxation of individuals or corporations.

Question:

9. Some commentators have asserted that the United States would be required to transfer sensitive technology, including technology with military applications, to developing countries if it acceded to the Law of the Sea Convention. . . . Do you believe there is any reason for concern that acceding to the Convention would re-

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quire the United States to transfer any technology to developing countries?

Answer:

No. Those commentators are simply wrong. No technology transfers are required by the Convention.

Question:

10. Some commentators have asserted that acceding to the Law of the Sea Convention will involve ceding to the International Seabed Authority sovereignty currently enjoyed by the United States over ocean resources. . . . Do you believe that acceding to the Convention would involve any surrender of existing United States claims to sovereignty over ocean resources?

Answer:

No. Such assertions are manifestly wrong. The United States has never claimed sovereignty over areas or resources of the deep seabed.

The Convention's provisions on the exclusive economic zone and continental shelf preserve and expand U.S. sovereign rights over the living and non-living ocean resources located within, and with regard to the continental shelf beyond, 200 miles of our coastline.

Question:

11. Some commentators have asserted that there is uncertainty as to the legal status of the 1994 Agreement Relating to the Implementation of Part XI of the Law of the Sea Convention, which addresses the Convention's deep seabed mining regime. I have received a letter from eight former Legal Advisers to the Department of State from both Republican and Democratic Administrations stating that the 1994 Agreement "has binding legal effect in its modification of the LOS Convention."\* Do you believe there is any basis for questioning the legal effect of the 1994 Agreement?

Answer:

No. The notion that the 1994 Agreement has no legal effect is just wrong.

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\* Editor's note: The letter from the former Legal Advisers, dated April 7, 2004, is reprinted in 98 Am. J. Int'l L. 307 (2004).

## **2. Freedom of Navigation Program**

A listing of U.S. armed forces' operational assertions of U.S. navigation and overflight rights during fiscal year 2004 under the freedom of navigation program is available at [www.defenselink.mil/policy/sections/policy\\_offices/isp/FON.pdf](http://www.defenselink.mil/policy/sections/policy_offices/isp/FON.pdf).

### **a. Limits in the Seas**

During 2005 the Department of State published Limits in the Seas, No. 126, "Maldives Maritime Claims and Boundaries" (September 8, 2005), and No. 127, "Taiwan's Maritime Claims" (November 15, 2005), both available at [www.state.gov/g/oes/ocns/c16065.htm](http://www.state.gov/g/oes/ocns/c16065.htm). As described on the Limits in the Seas homepage,

[t]his series issued by the Office of Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State, aims to set forth the basis of national arrangements for the measurement of marine areas by coastal States. It is intended for background use only. This does not necessarily represent an official acceptance by the United States Government of the limits claimed.

The Maldives and Taiwan publications, as is customary, note specific instances where the United States believes the country's claims are inconsistent with international law. The summary section in No. 127, for instance, provides the following concerning Taiwan.

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In general, the Law on the Territorial Sea and the Contiguous Zone is consistent with customary international law as reflected in the LOS Convention. However, the provisions on baselines and innocent passage deviate significantly from those rules. In addition, some of the activities listed as making passage not innocent are not consistent with article 19.2 of the LOS Convention.

The Law on the Exclusive Economic Zone and the Continental Shelf is also generally consistent with customary international law

as reflected in the LOS Convention. However, the provisions on Taiwan's rights and the course of submarine cables deviate significantly from those rules.

Taiwan has promulgated a number of laws and regulations to protect the marine environment. The provisions most comparable to Part XII of the LOS Convention on protection and preservation of the marine environment are contained in articles 10-13 of the Law on the Exclusive Economic Zone and the Continental Shelf. A few of the provisions of this Law are not consistent with the comparable provisions of the LOS Convention.

Marine scientific research (MSR) is addressed in article 9 of the Law on the Exclusive Economic Zone and the Continental Shelf. The regime of MSR is specifically addressed in Part XIII of the LOS Convention. In a number of aspects, involving supervision, suspension and cessation of MSR activities, interference with exercise of rights, information on results of research, and security, article 9 of this Law is not consistent with the LOS Convention.

***b. Oman: Strait of Hormuz***

In May 2005 the United States responded to a diplomatic note from Oman alleging that transits of the Strait of Hormuz by three U.S. ships during 2004 and 2005 violated international law. The substantive paragraphs of the U.S. note in response are set forth below in full.

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[The United States] has the honor to refer to the Note of the Embassy of the Sultanate of Oman Number OOI/E.IMO.V/05 of January 12, 2005, the Note of January 13, 2005, and the Note Number 008/E.IMO.V/05 of March 11, 2005, to the American Embassy in London concerning transits of the Strait of Hormuz by United States Ships HARRY S TRUMAN in August 2004, ROOSEVELT in November 2004 and BUNKER HILL in January 2005. The Notes assert that the transits violated "the relevant conventions and international laws, especially, the United Nations Convention on the Law of the Sea," in that the ships violated the traffic lanes and helicopters associated with each warship were "violating the traffic lines" in the Strait of Hormuz by hovering above the ship

during transit passage. As provided in article 41 of the Law of the Sea Convention, traffic separation schemes properly established through the International Maritime Organization apply to ships but not to aircraft. Article 39.3 provides that state aircraft in transit passage will normally comply with ICAO Rules of the Air; those rules do not apply to IMO traffic separation schemes. Hence, there is no legal requirement for aircraft engaged in transit passage to fly only in the airspace above the sea lanes established pursuant to such a traffic separation scheme.

As the Government of the United States of America has noted on previous occasions, international law, as reflected in the Law of the Sea Convention, defines the right of transit passage as the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait in the normal mode of operation. Thus, ships and aircraft may proceed in their normal modes, which in this case include the “hovering” of helicopters. For example, aircraft and naval/air forces generally may be deployed in a manner consistent with the normal security needs of forces while transiting the strait. The right of transit passage applies throughout the strait as well as in its approaches.

Article 41.7 of the Convention provides that ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with Article 41. Sovereign immune vessels are not required to comply with such sea lanes and traffic separation schemes while in transit passage but must exercise due regard for the safety of navigation. Thus, warships and other sovereign immune vessels may transit outside prescribed traffic separation schemes but must exercise due regard for the safety of navigation.

The Department of Defense advises that the HARRY S TRUMAN transited the Strait of Hormuz on November 18, 2004 (not in August), that the ROOSEVELT transited the Strait on November 4, 2004, and that the BUNKER HILL (not the BARRY), transited the Strait on January 23, 2005. The helicopters in question were deployed in a manner consistent with the normal security needs of the transiting vessels with which they were associated and properly exercised the right of transit passage. The Department of Defense

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further advises that the ships elected to remain inside the traffic lanes while transiting the Strait.

The United States reaffirms its navigation and overflight rights, as were exercised by the U.S. Navy aircraft in question in November 2004 and January 2005.

*c. Pilotage*

In 2004 Australia proposed to the International Maritime Organization (“IMO”) that the compulsory pilotage scheme in place for the Great Barrier Reef be extended to the Torres Strait. At the various meetings when this proposal was considered (Marine Safety Committee (“MSC”) 79, MSC Subcommittee on Safety of Navigation (“NAV”) 50, and Marine Environment Protection Committee (“MEPC”) 52 and 53), the United States endorsed the protection of the Torres Strait while making clear that it viewed the draft resolution as providing no international legal basis for mandatory pilotage for ships exercising the right of transit passage through an international strait. The Report of the MEPC on its Fifty-Third Session, July 25, 2005, IMO Doc. MEPC 53/24, included resolution MEPC.133(53), “Designation of the Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area.” The resolution “*recommend[ed]* . . . that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they *should* act in accordance with Australia’s system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers, and gas carriers, irrespective of size when navigating . . . the Great Barrier Reef . . . and the Torres Strait and the Great North East Channel. . . .” (emphasis added). MEPC 53/24/Add.2 Annex 21. The report summarized the position of the United States as excerpted below. MEPC 53/24 at 44-45.

The full text of the report is available at [www.rina.org.uk/rfiles/IMO/MEPC-53-finalreport.pdf](http://www.rina.org.uk/rfiles/IMO/MEPC-53-finalreport.pdf).

\* \* \* \*

8.4 The Committee noted the document MEPC 53/8/3 by Australia and Papua New Guinea contained a draft MEPC resolution to designate the Torres Strait as an extension to the existing Great Barrier Reef PSSA [Particularly Sensitive Sea Area] and make the APMs [Associated Protective Measures] applicable to the Torres Strait. The new MEPC resolution would replace resolution MEPC.45(30), incorporating the text agreed at MSC 79.

8.5 In commenting on document MEPC 53/8/3, the delegation of the United States appreciated the co-operative spirit shown at MSC 79, which resulted in the draft resolution before this Committee. The delegation of the United States stated that this draft resolution recognized not only the environmental sensitivity of the Torres Strait, but also the important and fundamental navigational rights provided by international law; supported raising the international awareness of the environmental sensitivity of the Torres Strait and the facilitation of safe and efficient shipping within this Strait; and was clear in its language and effect and represented a serious commitment by IMO and Member States regarding the protection of the Torres Strait. The delegation also stated that it must be recognized that this resolution was recommendatory and provided no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation. The United States could not support the resolution if this Committee took a contrary view. Should the Committee adopt this resolution, the United States would implement its recommendations in a manner consistent with international law and the right of transit passage. The United States stressed that it would urge ships flying its flag to act in accordance with the recommendatory Australian system of pilotage for ships in transit through the Torres Strait to the extent that doing so did not deny, impair, hamper, or impede transit passage.

8.6 Several delegations supported the statement by the United States. The delegation of Australia indicated that it did not object to the statement.

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### 3. Canadian Marine Navigation Services Fee

In 2004 Transport Canada sent invoices to U.S. and other non-Canadian firms operating vessels on the Great Lakes informing them that they would have to pay a Marine Navigation Services Fee for navigation services rendered while in Canadian waters. Under this user fee regime, owners of Canadian vessels would pay the fee based on a formula that took into account the distance traveled by the vessel and the type and tonnage of cargo carried. In contrast, non-Canadian vessels carrying imported bulk goods were billed based on a formula that relied solely on the tonnage of cargo loaded or unloaded each time the vessel called on a port. The practical effect of this regime was that, without justification, non-Canadian shippers were required to pay a higher fee than their Canadian counterparts.

The United States asked Canada to hold its fee system in abeyance because of its concern that the differential fee structure placed a significant burden on U.S. shippers operating in the Great Lakes. In addition, the United States noted the possible relevance of Article I of the Boundary Waters Treaty of 1909, which states that: “[A]ll navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within in its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.”

Canada agreed to place the fee in abeyance, and to begin the domestic process of reworking the fee schedule on more equitable grounds in consultation with U.S. Great Lakes carriers. This process continued through 2004 and 2005.

### 4. Maritime Security Strategy

In September 2005 President Bush approved the National Strategy for Maritime Security, released September 20, 2005, avail-



able at [www.whitehouse.gov/homeland/maritime-security.html](http://www.whitehouse.gov/homeland/maritime-security.html).  
The introduction to the strategy described its purpose:

The safety and economic security of the United States depend in substantial part upon the secure use of the world's oceans. The United States has a vital national interest in maritime security. We must be prepared to stop terrorists and rogue states before they can threaten or use weapons of mass destruction or engage in other attacks against the United States and our allies and friends. Toward that end, the United States must take full advantage of strengthened alliances and other international cooperative arrangements, innovations in the use of law enforcement personnel and military forces, advances in technology, and strengthened intelligence collection, analysis, and dissemination.

Section III of the strategy, "Strategic Objectives," summarized the perceived threats and strategic objectives in responding to them.

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Today's transnational threats have the potential to inflict great harm on many nations. Thus, the security of the maritime domain requires comprehensive and cohesive efforts among the United States and many cooperating nations to protect the common interest in global maritime security. This Strategy describes how the United States Government will promote an international maritime security effort that will effectively and efficiently enhance the security of the maritime domain while preserving the freedom of the domain for legitimate pursuits.\*

This approach does not negate the United States' inherent right to self-defense or its right to act to protect its essential national

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\* The *National Strategy for Maritime Security* is guided by the objectives and goals contained in the *National Security Strategy* and the *National Strategy for Homeland Security*. This Strategy also draws upon the *National Strategy for Combating Terrorism*, the *National Strategy to Combat Weapons of Mass Destruction*, the *National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*, the *National Defense Strategy*, the *National Military Strategy*, and the *National Drug Control Strategy*.

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security interests. **Defending against enemies is the first and most fundamental commitment of the United States Government. Pre-eminent among our national security priorities is to take all necessary steps to prevent WMD from entering the country and to avert an attack on the homeland.** This course of action must be undertaken while respecting the constitutional principles upon which the United States was founded.

Three broad principles provide overarching guidance to this Strategy. First, *preserving the freedom of the seas* is a top national priority. The right of vessels to travel freely in international waters, engage in innocent and transit passage, and have access to ports is an essential element of national security. The free, continuing, unthreatened intercourse of nations is an essential global freedom and helps ensure the smooth operation of the world's economy.

Second, the United States Government must *facilitate and defend commerce* to ensure this uninterrupted flow of shipping. The United States is a major trading nation, and its economy, environment, and social fabric are inextricably linked with the oceans and their resources. The adoption of a just-in-time delivery approach to shipping by most industries, rather than stockpiling or maintaining operating reserves of energy, raw materials, and key components, means that a disruption or slowing of the flow of almost any item can have widespread implications for the overall market, as well as upon the national economy.

Third, the United States Government must *facilitate the movement of desirable goods and people across our borders, while screening out dangerous people and material*. There need not be an inherent conflict between the demand for security and the need for facilitating the travel and trade essential to continued economic growth. This Strategy redefines our fundamental task as one of good border management rather than one that pits security against economic well-being. Accomplishing that goal is more manageable to the extent that screening can occur before goods and people arrive at our physical borders.

In keeping with these guiding principles, the deep-seated values enshrined in the U.S. Constitution, and applicable domestic and international law, the following objectives will guide the Nation's maritime security activities:

- Prevent Terrorist Attacks and Criminal or Hostile Acts
- Protect Maritime-Related Population Centers and Critical Infrastructures
- Minimize Damage and Expedite Recovery
- Safeguard the Ocean and Its Resources

This Strategy does not alter existing authorities or responsibilities of the department and agency heads, including their authorities to carry out operational activities or to provide or receive information. It does not impair or otherwise affect the authority of the Secretary of Defense over the Department of Defense, including the chain of command for military forces from the President and Commander-in-Chief, to the Secretary of Defense, to the commander of military forces, or military command and control procedures.

\* \* \* \*

Section IV, "Strategic Actions," stated in part as follows.

The United States recognizes that, because of the extensive global connectivity among businesses and governments, its maritime security policies affect other nations, and that significant local and regional incidents will have global effects. Success in securing the maritime domain will not come from the United States acting alone, but through a powerful coalition of nations maintaining a strong, united, international front. The need for a strong and effective coalition is reinforced by the fact that most of the maritime domain is under no single nation's sovereignty or jurisdiction. Additionally, increased economic interdependency and globalization, largely made possible by maritime shipping, underscores the need for a coordinated international approach. Less than 3 percent of the international waterborne trade of the United States is carried on vessels owned, operated, and crewed by U.S. citizens. The United States also recognizes that the vast majority of actors and activities within the maritime domain are legitimate. Security of the maritime domain can be accomplished only by seamlessly employing all instruments of national power in a fully coordinated manner in concert with other nation-states consistent with international law.

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Maritime security is best achieved by blending public and private maritime security activities on a global scale into a comprehensive, integrated effort that addresses all maritime threats. Maritime security crosses disciplines, builds upon current and future efforts, and depends on scalable layers of security to prevent a single point of failure. Full and complete national and international coordination, cooperation, and intelligence and information sharing among public and private entities are required to protect and secure the maritime domain. Collectively, these five strategic actions achieve the objectives of this Strategy:

- Enhance International Cooperation
- Maximize Domain Awareness
- Embed Security into Commercial Practices
- Deploy Layered Security
- Assure Continuity of the Marine Transportation System

These five strategic actions are not stand-alone activities. Domain awareness is a critical enabler for all strategic actions. Deploying layered security addresses not only layers of prevention (interdiction and preemption) and protection (deterrence and defense) activities, but also the integration of domestic and international layers of security provided by the first three strategic actions.

On November 22, 2005, Secretary of State Condoleezza Rice signed an International Outreach and Coordination Strategy to Enhance Maritime Security to implement the National Strategy for Maritime Security, available at [www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0758.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0758.xml). A Department of State media note explained that President Bush had “designated the Secretary of State to lead coordination of U.S. maritime security activities with foreign governments and international organizations. The President further directed the Secretary to solicit international support for a strengthened global maritime security framework.”

The full text of the media note is available at [www.state.gov/r/pa/prs/ps/2005/57280.htm](http://www.state.gov/r/pa/prs/ps/2005/57280.htm).

## 5. Deep Water Port Approval

In January 2005 David A. Balton, Deputy Assistant Secretary of State, Bureau of Oceans and International Environmental and Scientific Affairs, provided written comments on an application by Freeport-McMoRan Energy, LLC ("FME") for a license to own, construct and operate a new offshore liquefied natural gas ("LNG") deepwater port in the Gulf of Mexico. The analysis was provided to the U.S. Coast Guard in the Department of Homeland Security and the U.S. Maritime Administration in the Department of Transportation pursuant to the Maritime Transportation Security Act of 2002 ("MTSA"), Pub. L. No. 107-295, 116 Stat. 2064. The MTSA requires the Department of State to provide written comments concerning the construction or operation of deepwater ports for natural gas pursuant to the Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126, 33 U.S.C. §§ 1501-1524 ("DWPA"). The proposed deep water port, also known as the Main Pass Energy Hub, would be located approximately sixteen miles off the coast of Louisiana on the outer continental shelf.

Excerpts follow from Mr. Balton's letter, including its analysis of applicable law. The full text of the letter is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Coast Guard and the U.S. Maritime Administration ("MARAD") prepared an environmental impact statement, made available on June 13, 2005, and scheduled public hearings on the application during July 2005; *see* 70 Fed. Reg. 35,277 (June 17, 2005). At the end of the year the license was pending.

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After reviewing FME's application, and subject to the comments below, the Department of State concludes that the application is adequate, and that the issuance of a license pursuant to 33 U.S.C. 1503 will have no adverse effect on programs within the jurisdiction of the Department of State. Our specific comments follow.

The DWPA at 33 U.S.C. 1505(a) requires the Department of Transportation to consult with the Department of State regarding the environmental review criteria established at Appendix A to 33

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CFR Part 148 for aspects over which the Department of State has jurisdiction. The Department of State serves as the primary Executive Branch coordinator for, and determines U.S. foreign policy regarding several of the criteria listed in the DWPA, including but not limited to effects on the marine environment, effects on alternate uses of the oceans, such as scientific study, fishing and exploitation of other living and non-living resources, effects of land-based developments related to DWP development and effects on human health and welfare.

After reviewing the FME license application and considering the environmental review criteria for DWPs in Appendix A of 33 CFR 148, the Department of State is of the view that granting the license will not have significant adverse effects regarding United States foreign policy with regard to the criteria described above, to include global and regional fisheries agreements, international agreements for the prevention of marine pollution and international agreements regarding oceanographic research and study.

The DWPA at 33 U.S.C. 1509(d)(1) requires the Secretary of Transportation to designate, after consultation with the Secretary of State, among others, a zone of appropriate size around any DWP for navigation safety, and in accordance with recognized principles of international law. Accordingly, such zones are governed by three principal sources: the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), specifically Articles 22, 60 and 211; the International Convention on the Safety of Life at Sea, 1974 (SOLAS), Annex, Chapter 5, primarily Regulation V/10; and the General Provisions on Ship's Routeing, adopted by the International Maritime Organization (IMO) pursuant to Assembly Resolution A.572(14), as amended. The Department of State, as the lead agency for policy matters involving UNCLOS, and as the coordinator for matters involving the IMO, has specific expertise and jurisdiction in these matters. Any ship's routeing measure established outside the U.S. territorial sea requires approval and adoption by the IMO, through its Safety of Navigation Subcommittee and its Maritime Safety Committee.

The DWPA at 33 U.S.C. 1518(a)(3) requires the Secretary of State to notify the government of each foreign state having vessels under its authority or flying its flag that may call at a DWP, that the

United States intends to exercise jurisdiction over such vessels. The notification must indicate that, absent the foreign State's objection, its vessels will be subject to U.S. jurisdiction whenever calling at the DWP or within an established safety zone (not greater than 500 meters) and using or interfering with the use of the DWP. Further, Section 1518(c)(2) states that entry by a vessel into the DWP is prohibited unless the flag State does not object to the exercise of U.S. jurisdiction or a bilateral agreement between the flag State of the vessel and the United States permitting the exercise of jurisdiction is in force.

However, Title 33 U.S.C. Section 1518 precedes the entry into force of UNCLOS Article 60, which grants coastal States the exclusive right to construct, authorize and regulate installations and structures in its EEZ, including DWPs. It also precedes the designation of the EEZ of the United States, which grants certain rights and jurisdiction under customary international law, as stated in UNCLOS Part V. While Article 60(7) indicates that a DWP does not have the status of an island, has no territorial sea of its own, and its presence does not affect the delimitation of the territorial sea, the EEZ or the continental shelf, the Government of the United States interprets UNCLOS Article 12 to mean that any roadstead located outside the territorial sea and used for the loading or unloading of ships is included in the territorial sea.

Thus, any ship calling at a DWP in our EEZ would be subject to U.S. jurisdiction as if it were in the territorial sea. As the proposed Main Pass Energy Hub DWP would be in the EEZ of the United States, this principle would apply. Any ship flying the flag of a party to UNCLOS would be subject to Articles 12 and 60 and would be bound to the same jurisdictional principles of 33 U.S.C. Section 1518, thus obviating the need for further bilateral agreements. If a ship flying the flag of a non-party to UNCLOS were to call at the DWP, the State Department would only object to such calls if the non-party flag State had filed an objection to our assertion of jurisdiction.

Pursuant to the DWPA at 33 U.S.C. 1521, upon approval of the license to construct this DWP, the State Department will notify the government of Mexico of such action, and will invite discussion with them on the subject of LNG DWPs.

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## 6. Other Boundary Issues

### a. *Litigation concerning submerged lands lying off the coast of Alaska*

The State of Alaska brought suit against the United States under the original jurisdiction of the U.S. Supreme Court over title to certain submerged lands underlying waters located in southeast Alaska. Following the Court's appointment of a Special Master, both sides moved for summary judgment on Counts I, II, and IV of Alaska's complaint. *See Digest 2002* at 738-56. The Special Master issued a report in 2004 recommending the grant of summary judgment on those counts to the United States. On June 6, 2005, the Supreme Court issued a unanimous decision overruling Alaska's objections to the Special Master's report, holding that the United States, not Alaska, owned two areas of submerged lands off the Alaskan coast. The Court concluded:

Alaska shall take title neither to the submerged lands underlying the pockets and enclaves of water at issue in counts I and II of its Amended Complaint [involving submerged lands more than three miles from the shoreline within the Alexander Archipelago] nor to the submerged lands underlying the waters of Glacier Bay at issue in Count IV. . . .

*Alaska v. United States*, 545 U.S. 75 (2005). The Court also directed the parties to prepare a proposed decree, which the Court adopted on January 23, 2006. 126 S. Ct. 1014 (2006).

The Court's statement of U.S. law applicable to title to certain submerged lands and its analysis of Counts I and II, which involve international law issues, are excerpted below. (Citations to the Special Master's Report and parties' submissions have been omitted.) As to Count IV, the Court stated that "[t]he Federal Government can overcome [a State's] presumption [of title to submerged lands beneath inland naviga-



ble waters within their boundaries] and defeat a future State's title to submerged lands by setting them aside before statehood in a way that shows an intent to retain title" and found that the United States had done so as to Glacier Bay, at issue in that count.\*

\* \* \* \*

[I] We begin by reviewing the general principles elaborated in the resolution of similar submerged lands disputes in our earlier cases.

States enjoy a presumption of title to submerged lands beneath inland navigable waters within their boundaries and beneath territorial waters within three nautical miles of their coasts. This presumption flows from two sources. Under the established rule known as the equal footing doctrine, new States enter the Union "on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries." *United States v. Alaska*, 521 U.S. 1, 5, 138 L. Ed. 2d 231, 117 S. Ct. 1888 (1997) (*Alaska (Arctic Coast)*). Under the Submerged Lands Act (SLA), 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*, which applies to Alaska through an express provision of the Alaska Statehood Act (ASA), § 6(m), 72 Stat. 343, the presumption of state title to "lands beneath navigable waters within the boundaries of the respective States" is "confirmed" and "established." 43 U.S.C. § 1311(a); see also *Alaska (Arctic Coast)*, 521 U.S., at 5-6, 138 L. Ed. 2d 231, 117 S. Ct. 1888. The SLA also "establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States." *Id.*, at 6, 138 L. Ed. 231, 117 S. Ct. 1888. "As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act

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\* As to Count III, the Court stated: "the parties and the Special Master are in agreement that this Court should confirm the United States' proposed disclaimer of title [to marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.] The proposed disclaimer is hereby accepted."

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alone to submerged lands extending three miles seaward of its coastline.” *Ibid.*

\* \* \* \*

[II] The first area of submerged land in dispute, claimed by Alaska under alternative theories in counts I and II of its amended complaint to quiet title . . . , consists of pockets and enclaves of submerged lands underlying waters in between and fringing the southeastern Alaska islands known as the Alexander Archipelago. These disputed submerged lands . . . share a common feature: All points within the pockets and enclaves are more than three nautical miles from the coast of the mainland or of any individual island of the Alexander Archipelago.

For these pockets and enclaves, the dispositive question is whether the Alexander Archipelago’s waters qualify as inland waters. If they do, Alaska’s coastline would begin at the outer bounds of these inland waters as. . . . See 43 U.S.C. § 1301(c) . . . Under the equal footing doctrine and the SLA, a presumption of state title would then arise as to all the submerged lands underlying both the inland waters landward of this coastline, and also the territorial sea within three nautical miles of it. Because the United States concedes it could not rebut the presumption of State title as to this aspect of the case, Alaska would have title to all the pockets and enclaves of submerged lands in dispute.

If the Alexander Archipelago’s waters do not qualify as inland, then they instead qualify as territorial sea. In that case Alaska would have no claim of title to the disputed pockets and enclaves, as these lands are beyond three nautical miles from the coast of the mainland or any individual island.

\* \* \* \*

[III] In count I of its Amended Complaint, Alaska alleges that the waters of the Alexander Archipelago are historic inland waters. As this Court has recognized, “where a State within the United States wishes to claim submerged lands based on an area’s status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations.” *Alaska (Arctic Coast)*, 521 U.S., at 11, 138 L. Ed. 231, 117

S. Ct. 1888. “For this showing,” we have elaborated, “the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation.” *Alaska (Cook Inlet)*, *supra*, at 197, 45 L. Ed. 109, 95 S. Ct. 2240.

Nations may exclude from inland waters even vessels engaged in so-called “innocent passage”—passage that “is not prejudicial to the peace, good order or security of the coastal State,” Arts. 14(1), 14(4) of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1607, 1610 T. I. A. S. No. 5639 (hereinafter Convention). See *United States v. Louisiana*, 470 U.S. 93, 113, 84 L. Ed. 2d 73, 105 S. Ct. 1074 (1985) (*Alabama and Mississippi Boundary Case*); *United States v. Louisiana*, 394 U.S. 11, 22, 22 L. Ed. 2d 44, 89 S. Ct. 773 (1969). To claim a body of water as historic inland water, it is therefore important to establish that the right to exclude innocent passage has somehow been asserted, even if never actually exercised. See *Alabama and Mississippi Boundary Case*, 470 U.S., at 113, 84 L. Ed. 2d 73, 105 S. Ct. 1074. The Court also has considered the “vital interests of the United States” in designating waters as historic inland waters. *Id.*, at 103, 84 L. Ed. 2d 73, 105 S. Ct. 1074.

The Special Master recommended that the Court grant summary judgment to the United States on this count. The Special Master first made a thorough examination of historical documents, from 1821 to the present, bearing on the status of the Alexander Archipelago’s waters. Based on his examination of the record evidence from all of these periods, the Special Master concluded that “Russia and the United States historically did not assert authority to exclude vessels from making innocent passage through the waters of the Alexander Archipelago.” In the Special Master’s view, Alaska had at best “uncovered and presented only ‘questionable evidence’ that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim.”

Though Alaska’s failure to demonstrate that the waters of the Alexander Archipelago had historically been treated as inland waters would by itself justify granting summary judgment to the United States on count I, the Special Master also addressed other relevant factors, such as the acquiescence of other nations and the

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vital interests of the United States. In the Special Master's view these factors only strengthened the case for granting summary judgment to the United States.

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[A] . . . [N]one of the incidents Alaska cites from the period of Russian sovereignty support the proposition that Russia treated the waters of the Alexander Archipelago as inland waters prior to ceding Alaska to the United States in 1867.

\* \* \* \*

[B] As to the years between 1867 and 1903, Alaska does attempt to explain away a significant event which undercuts its claim, but this attempt is unsuccessful. In 1886, Secretary of State Thomas F. Bayard wrote a letter to Secretary of Treasury Daniel Manning concerning the limits of the territorial waters of the United States on both the northeastern and the northwestern coasts. See 1 J. Moore, *Digest of International Law* 718-721 (1906). The State Department's position with respect to waters surrounding fringing islands on both coasts was that the sovereigns of those islands could only claim a territorial sea of three miles from the coast of each island. Secretary Bayard explained that, in asserting the 3-mile belt of territorial sea, the United States denied neither "the free right of vessels of other nations to pass, on peaceful errands, through this zone" nor the right "of relief, when suffering from want of necessities, from the shore." *Id.*, at 720-721.

According to Secretary Bayard, the State Department's position was a well-considered one, rooted in principles of reciprocity and consistent practice:

"These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them . . . against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia un-

der the Alaska purchase.” *Id.*, at 721 (internal quotation marks omitted).

The Special Master singled out this letter as “unambiguously support[ing] the United States’ position that the United States and Russia historically did not assert the right to exclude foreign vessels from the waters of the Archipelago.” Emphasizing the statements in the letter that the United States could not “claim greater jurisdiction” than three miles of marginal seas and that foreign vessels had the right to make “free transit,” the Special Master concluded that “[o]fficials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters.”

... It may be true that no foreign nation ever became aware of Secretary Bayard’s letter (though the subsequent publication of the letter in the United States’ Digest of International Law gives us reason to believe the contrary). Regardless, Secretary Bayard’s letter still provides strong evidence that the United States, as of 1886, did not claim a right to exclude all foreign vessels from the Alexander Archipelago waters and had no intention of doing so. We do not need to parse the letter to see whether it “announce[d] to any foreign nation that the United States had abandoned a claim to the Archipelago,” for Alaska can muster no proof that the United States as of 1886 had made any such claim in the first place.

[C] A stronger piece of evidence Alaska identifies to support its historic inland waters claim is a litigating position taken by the United States during an arbitration proceeding in 1903. This proceeding was before the Alaska Boundary Tribunal, a body convened to resolve a dispute between the United States and Britain regarding the land boundary between southeastern Alaska and Canada.

In a written submission to the tribunal, the United States described its view of the “political coast” of Alaska as enclosing all of the Alexander Archipelago waters, as shown on the map in Appendix A, *infra*. 4 ABT Proceedings, pt. 1, pp 31-32 (1903). According to the United States’ submissions, “[t]he boundary of Alaska,—that is, the exterior boundary from which the marine league [of the territorial sea] is measured,—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands.” 5 *id.*, pt. 1, at 15-16. At oral ar-

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gument before the tribunal, moreover, counsel for the United States made explicit that the recognition of such a “political coast” would render all waters landward of it “just as much interior waters as the interior waters of Loch Lomond.” 7 *id.*, at 611 (1904).

. . . [T]he Special Master . . . concluded that the United States’ submissions to the tribunal were “not an adequate assertion of authority over the waters of the Alexander Archipelago.” *Id.*, at 118. The Special Master noted that the issue before the 1903 tribunal was not “[t]he status of the waters of the Alexander Archipelago,” *ibid.*, but rather the land boundary between southeast Alaska and Canada; that the United States’ declarations regarding the status of the Alexander Archipelago took up “only a few paragraphs in a seven volume record”; and that “[f]or these reasons, it would be unrealistic to conclude that counsel’s assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them.”

Alaska responds that the Special Master was incorrect to conclude that the United States’ submissions in 1903 could not have made foreign nations other than Britain aware of its claim. Alaska argues that Norway became aware of the United States’ submissions and then relied on them in its dispute with the United Kingdom in the well-known *Fisheries Case* (*U.K. v. Nor.*), 1951 I. C. J. 116 (Judgment of Dec. 18). As the Special Master explained, however, “[t]he ability of one foreign nation to discover the United States’ argument when litigating a related issue . . . does not mean that foreign nations should have known of the United States’ position.” This reasoning carries particular force in light of the precedent a contrary conclusion would create. If this Court were to recognize historic inland waters claims based on arguments made by counsel during litigation about nonmaritime boundaries, “the United States would itself become vulnerable to similarly weak claims by other nations that would restrict the freedom of the seas.” We are reluctant to create a precedent that would have this effect.

[D] The litigating position taken by the United States at the ABT Proceedings at best would provide weak support for inland status of the Alexander Archipelago waters even were we to accept it as signaling a significant change from the view expressed in Secre-

tary Bayard's letter of 1886; for there is little evidence that the United States later acted in a manner consistent with this litigating position.

At best, Alaska's submissions before this Court establish that the United States made one official statement—in the 1903 Alaska Boundary Arbitration—describing the Alexander Archipelago waters as inland, and that the United States seized one foreign vessel—the *Marguerite*—in a manner arguably consistent with the status of those waters as inland. These incidents are insufficient to demonstrate the continuous assertion of exclusive authority, with acquiescence of foreign nations, necessary to support an historic inland waters claim. Alaska's exception to the Special Master's recommendation on count I of the Amended Complaint is overruled.

[IV] In count II of its Amended Complaint, Alaska presents an alternative theory to justify treating the Alexander Archipelago's waters as inland. Alaska's alternative theory is that the waters of the Alexander Archipelago in truth consist of two vast, but as yet unnoticed, juridical bays. Waters within a juridical bay would be deemed inland waters. Art. 5(1) of the Convention, 15 U. S. T., at 1609. Thus, if accepted, Alaska's theory would render all the Alexander Archipelago's waters inland waters to the extent they lie within the limits of the bays Alaska identifies. For this reason, and because the United States would not be able to rebut the presumption of title that would arise from inland waters status, Alaska's alternative theory would require the Court to accept Alaska's claim of title to the pockets and enclaves in dispute.

The parties agree that Alaska's claimed juridical bays would exist only if four of the Alexander Archipelago's islands—Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island—were deemed to be connected to each other and to the mainland. We have recognized that such “assimilat[ion]” of islands fringing the mainland is possible, albeit only in “exceptional case[s]” in which “an island or group of islands . . . ‘are so integrally related to the mainland that they are realistically parts of the “coast.””’” *United States v. Maine*, 469 U.S. 504, 517, 83 L. Ed. 2d 998, 105 S. Ct. 992 (1985) (quoting *United States v. Louisiana*, 394 U.S., at 66, 22 L. Ed. 2d 44, 89 S. Ct. 773). If the assimilation Alaska urges were accepted, the four islands Alaska has identified would form a con-



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structive peninsula extending from the mainland and dividing the Alexander Archipelago's waters in two. To bolster its case, Alaska labels the waters north and south of this hypothetical peninsula the "North Bay" and the "South Bay."

Were we to accept Alaska's hypothetical peninsula, we would then be required to determine whether North Bay and South Bay in fact qualify as juridical bays under the Convention, which we have customarily consulted for purposes of "determining the line marking the seaward limit of inland waters of the States." *United States v. Maine*, *supra*, at 513, 83 L. Ed. 2d 998, 105 S. Ct. 992. Article 7(2) of the Convention sets forth the following geographic criteria for deciding whether a body of water qualifies as a bay:

"For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." 15 U. S. T., at 1609.

This definition can be understood to comprise a number of elements. To apply the definition to a given body of water, one must first determine whether the body of water satisfies the descriptive test of being a "well-marked indentation." One must then determine, among other things, whether the indentation's area satisfies the mathematical "semi-circle" test set forth in the second sentence of Article 7(2).

After due consideration of the parties' arguments, the Special Master recommended that the Court reject Alaska's alternative theory. . . .

\* \* \* \*

We overrule Alaska's exception. For the sake of brevity we assume, *arguendo*, that each of the islands in Alaska's hypothetical peninsula should be assimilated one to another (though we are aware of, and Alaska itself cites, no precedent foreign or domestic in which such a massive amount of successive assimilation has been



accepted for the purpose of identifying a juridical bay). Even with the benefit of this daunting doubt Alaska could not prevail, for its hypothetical bays do not satisfy the Convention's descriptive requirement of being well-marked indentations.

To qualify as a well-marked indentation, a body of water must possess physical features that would allow a mariner looking at navigational charts that do not depict bay closing lines nonetheless to perceive the bay's limits, and hence to avoid illegal encroachment into inland waters. See G. Westerman, *The Juridical Bay* 82-85 (1987). Alaska's hypothetical bays do not possess these features. . . .

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. . . It is not just that no mariner and no geographer (and not even Alaska's litigators) before this action recognized Alaska's claimed bays as bays or sounds. It appears that no one before this action recognized Alaska's claimed bays as constituting cohesive bodies of water at all.

Even accepting the constructive peninsula Alaska has crafted out of four separate islands within the Alexander Archipelago, Alaska's claimed bays still fail to qualify as "well-marked indentations" for purposes of the Convention. For this reason, we reject the alternative theory Alaska urges in count II of its Amended Complaint. Alaska's exception to the Special Master's recommendation on this count is overruled.

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***b. United States-Canada***

***(1) Beaufort Sea dispute***

On February 16, 2005, the U.S. Department of the Interior, Minerals Management Service ("MMS"), issued a final notice of sale for the "Outer Continental Shelf Beaufort Sea Alaska, Oil and Gas Lease Sale 195." 70 Fed. Reg. 9099 (Feb. 24, 2005). Canada objected at the time the sale was first announced in 2004 that certain areas to be offered were within Canada's claimed maritime boundary. In response, the United States had stated its view that the areas fall within U.S.

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sovereign rights and had stated that the sale would occur in a manner that would not exacerbate the dispute. *See Digest 2004* at 734-35. The February 2005 Federal Register notice stated: "Four blocks in the easternmost Beaufort Sea area are subject to jurisdictional claims by both the United States and Canada. This Notice refers to this area as the Disputed Portion of the Beaufort Sea." Paragraph (b) in the Method of Bidding section provided that separate, signed bids on the Disputed Portion of the Beaufort Sea were to be submitted in sealed envelopes, and "on or before March 30, 2010, the MMS will determine whether it is in the best interest of the United States either to open bids for these blocks or to return the bids unopened." As to jurisdiction over the area, the notice stated:

The United States claims exclusive maritime resource jurisdiction over the area offered. Canada claims such jurisdiction over the four easternmost blocks included in the sale area. These blocks are located in Official Protraction Diagram NR 07-06 as block numbers 6201, 6251, 6301, and 6351. Nothing in this Notice shall affect or prejudice in any manner the position of the United States with respect to the nature or extent of the internal waters, the territorial sea, the high seas, or sovereign rights or jurisdiction for any purpose whatsoever. . . .

The sale was carried out on March 30, 2005. In a diplomatic note dated May 20, 2005, the Embassy of Canada expressed concerns regarding the sale and the Federal Register notice. The substantive paragraphs of the U.S. note in response, dated July 14, 2005, follow in full.

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The Government of the United States does not accept that any part of Lease Sale 195 encroaches on Canada's sovereign rights under international law. The United States does not share the Canadian view that the location of the maritime boundary in this area follows the 141st meridian. The United States on many occasions has informed Canada of the proper location of the maritime boundary in this area, which has been followed in the case of Lease Sale 195.

The Government of the United States notes that it used special procedures with respect to the portion of Lease Sale 195 that is subject to an overlapping claim by the Government of Canada. These procedures are without prejudice to U.S. interests or the future settlement of the boundary. The Government of the United States notes that there were no bids submitted with respect to that portion of Lease Sale 195 subject to an overlapping claim by the Government of Canada.

*(2) Machias Seal Island*

In February 2005 the American embassy in Ottawa, Canada, delivered a diplomatic note to the Government of Canada, stating the U.S. position on sovereignty over Machias Seal Island. The substantive paragraphs of the diplomatic note are set forth in full.

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[The United States] has the honor to refer to discussions at the U.S. Department of State on January 24, 2005 between representatives of the Government of Canada and representatives of the Government of the United States of America regarding Canada's intention to construct a concrete ramp on Machias Seal Island, and to a notice of tender for the construction of the ramp, published by Canada on February 7, 2005.

As the United States Government has expressed on many occasions, Machias Seal Island (and adjacent North Rock) is United States territory. The United States protests Canada's construction of the ramp. Activities by Canadian officials or their contractors on Machias Seal Island shall not be taken as United States acquiescence to Canada's assertion of sovereignty over Machias Seal Island or as a derogation of U.S. sovereignty over Machias Seal Island.

The United States stands ready to discuss with Canada a long-term resolution of this matter.

**7. Applicability of U.S. Law to Foreign-Flag Cruise Ships**

On June 6, 2005, the U.S. Supreme Court decided that Title III of the Americans with Disabilities Act of 1990, 42 U.S.C.

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§§ 12181-12189, is applicable to foreign-flag cruise ships in U.S. waters, with certain exceptions. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005). The Court overruled a decision of the Fifth Circuit Court of Appeals to the contrary and remanded for further proceedings. On September 29, 2005, the Fifth Circuit remanded to the district court. 427 F.3d 285 (5th Cir. 2005).

A majority of five of the justices joined in the opinion of Justice Kennedy, only as to Parts I, II-A-1, and II-B-2. Those parts, which include the Court's conclusion that Title III's requirement to remove barriers when "readily achievable" does not require changes that would bring the vessel into noncompliance with any international legal obligation, are excerpted below. *See also* Brief of the United States as *Amicus Curiae*, filed with the Supreme Court in December 2004, available at [www.usdoj.gov/osg/briefs/2004/3mer/1ami/2003-1388.mer.ami.html](http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2003-1388.mer.ami.html).

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I. The respondent Norwegian Cruise Line Ltd. (NCL), a Bermuda Corporation with a principal place of business in Miami, Florida, operates cruise ships that depart from, and return to, ports in the United States. The ships are essentially floating resorts. They provide passengers with staterooms or cabins, food, and entertainment. The cruise ships stop at different ports of call where passengers may disembark. Most of the passengers on these cruises are United States residents; under the terms and conditions of the tickets, disputes between passengers and NCL are to be governed by United States law; and NCL relies upon extensive advertising in the United States to promote its cruises and increase its revenues.

Despite the fact that the cruises are operated by a company based in the United States, serve predominately United States residents, and are in most other respects United States-centered ventures, almost all of NCL's cruise ships are registered in other countries, flying so-called flags of convenience. The two NCL cruise ships that are the subject of the present litigation, the Norwegian Sea and the Norwegian Star, are both registered in the Bahamas.

The petitioners are disabled individuals and their companions who purchased tickets in 1998 or 1999 for round-trip cruises on the Norwegian Sea or the Norwegian Star, with departures from Houston, Texas. Naming NCL as the defendant, the petitioners filed a class action in the United States District Court for the Southern District of Texas on behalf of all persons similarly situated. They sought declaratory and injunctive relief under Title III of the ADA, which prohibits discrimination on the basis of disability. The petitioners asserted that cruise ships are covered both by Title III's prohibition on discrimination in places of "public accommodation," § 12182(a), and by its prohibition on discrimination in "specified public transportation services," § 12184(a). Both provisions require covered entities to make "reasonable modifications in policies, practices, or procedures" to accommodate disabled individuals, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A), and require removal of "architectural barriers, and communication barriers that are structural in nature" where such removal is "readily achievable," §§ 12182(b)(2)(A)(iv), 12184(b)(2)(C).

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[II.A.I.] Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations, 42 U.S.C. § 12182(a), and public transportation services, § 12184(a). The general prohibitions are supplemented by various, more specific requirements. Entities that provide public accommodations or public transportation: (1) may not impose "eligibility criteria" that tend to screen out disabled individuals, §§ 12182(b)(2)(A)(i), 12184(b)(1); (2) must make "reasonable modifications in policies, practices, or procedures, when such modifications are necessary" to provide disabled individuals full and equal enjoyment, §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A); (3) must provide auxiliary aids and services to disabled individuals, §§ 12182(b)(2)(A)(iii), 12184(b)(2)(B); and (4) must remove architectural and structural barriers, or if barrier removal is not readily achievable, must ensure equal access for the disabled through alternative methods, §§ 12182(b)(2)(A)(iv)-(v), 12184(b)(2)(C).

These specific requirements, in turn, are subject to important exceptions and limitations. . . .

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Although the statutory definitions of “public accommodation” and “specified public transportation” do not expressly mention cruise ships, there can be no serious doubt that the NCL cruise ships in question fall within both definitions under conventional principles of interpretation. §§ 12181(7)(A)-(B),(I),(L), 12181(10). The Court of Appeals for the Fifth Circuit, nevertheless, held that Title III does not apply to foreign-flag cruise ships in United States waters because the statute has no clear statement or explicit text mandating coverage for these ships. This Court’s cases, particularly *Benz* and *McCulloch*, do hold, in some circumstances, that a general statute will not apply to certain aspects of the internal operations of foreign vessels temporarily in United States waters, absent a clear statement. The broad clear statement rule adopted by the Court of Appeals, however, would apply to every facet of the business and operations of foreign-flag ships. That formulation is inconsistent with the Court’s case law and with sound principles of statutory interpretation.

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[B.2.] Title III requires barrier removal if it is “readily achievable,” § 12182(b)(2)(A)(iv). The statute defines that term as “easily accomplishable and able to be carried out without much difficulty or expense,” § 12181(9). Title III does not define “difficulty” in § 12181(9), but use of the disjunctive—“easily accomplishable and able to be carried out without much difficulty or expense”—indicates that it extends to considerations in addition to cost. Furthermore, Title III directs that the “readily achievable” determination take into account “the impact . . . upon the operation of the facility,” § 12181(9)(B).

Surely a barrier removal requirement under Title III that would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, [1979-1980], 32 U. S. T. 47, T. I. A. S. No. 9700, or any other international legal obligation, would create serious difficulties for the vessel and would have a substantial impact on its operation, and thus would not be “readily achievable.” This understanding of the statute, urged by the United States, is eminently reasonable. Brief as *Amicus Curiae* 27-28; ADA Title III Technical Assistance Manual

III-1.2000(D) (Supp 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html> (as visited May 31, 2005, and available in Clerk of Court's case file); 56 Fed. Reg. 45600 (1991). If, moreover, Title III's "readily achievable" exemption were not to take conflicts with international law into account, it would lead to the anomalous result that American cruise ships are obligated to comply with Title III even if doing so brings them into noncompliance with SOLAS, whereas foreign ships—which unlike American ships have the benefit of the internal affairs clear statement rule—would not be so obligated. Congress could not have intended this result.

It is logical and proper to conclude, moreover, that whether a barrier modification is "readily achievable" under Title III must take into consideration the modification's effect on shipboard safety. A separate provision of Title III mandates that the statute's nondiscrimination and accommodation requirements do not apply if disabled individuals would pose "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services," § 12182(b)(3). This reference is to a safety threat posed by a disabled individual, whereas here the question would be whether the structural modification itself may pose the safety threat. It would be incongruous, nevertheless, to attribute to Congress an intent to require modifications that threaten safety to others simply because the threat comes not from the disabled person but from the accommodation itself. The anomaly is avoided by concluding that a structural modification is not readily achievable within the meaning of § 12181(9) if it would pose a direct threat to the health or safety of others.

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## **B. OUTER SPACE**

On October 18, 2005, U.S. Advisor Kenneth Hodgkins addressed the UN General Assembly Fourth Committee (Special Political and Decolonization) on International Cooperation in the Peaceful Uses of Outer Space. Mr. Hodgkins' statement, excerpted below, is available at [www.un.int/usa/05\\_171.htm](http://www.un.int/usa/05_171.htm).

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This year of accomplishment is a fitting tribute to the over four decades during which COPUOS has served as the only standing body of the UN that is concerned exclusively with the peaceful uses of outer space. Whereas other UN organs, including the First Committee, hold competence to consider disarmament issues relating to outer space, COPUOS offers us a forum focused on promoting the cooperative achievement—and sharing—of benefits from space exploration.

I would now like to review the work of COPUOS and its subcommittees over the course of 2005. The Scientific and Technical Subcommittee met in February and had a very constructive session. We would particularly like to note the successful work of the STSC Working Group on Nuclear Power Sources in space. The Working Group, following the multi-year work plan approved by this Committee in 2003, made significant progress in identifying potential options for establishing an international framework of goals and recommendations for the safety of planned space NPS applications. We were pleased that the Working Group, and the Subcommittee, agreed to hold a joint STSC/IAEA workshop concurrently with the 2006 STSC meeting in Vienna. We are optimistic that such a workshop will help us to determine how to proceed in our efforts to develop the framework for the safe use of nuclear power sources in outer space.

In the area of space debris mitigation, the Subcommittee this year made some very significant progress. As noted in its report, consensus was reached on a new two-year work plan to develop a space debris mitigation document based on the Inter-Agency Space Debris Coordination Committee (IADC) Space Debris Mitigation Guidelines. The Subcommittee's Space Debris Working Group has been authorized to work intersessionally to fulfill its work plan. The United States views the IADC guidelines as solid, technically-based measures for any nation to adopt and implement in its national space activities. The United States supports the IADC orbital debris mitigation guidelines, and our domestic agencies are well along in implementing debris mitigation practices that are consistent with those guidelines. However, we recognize the utility of



developing voluntary guidelines within COPUOS, and thus will work constructively in the Subcommittee to achieve that goal.

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The past session of the Legal Subcommittee also yielded productive results on a range of topics. Among those, the Subcommittee considered developments relating to a possible Space Assets Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment.

The United States believes that the Space Assets Protocol will facilitate the provision of commercial financing for space activities. Private activities in outer space have become increasingly important in furthering space technology and exploration in recent years. Financing for commercial activities is key to their future success. The second session of governmental experts for the consideration of the preliminary draft Protocol took place in October 2004 at the offices of the Food and Agricultural Organization in Rome. Substantial progress was also made at that time. We are pleased that the Subcommittee will continue to have on its agenda this item and we look forward to working with other delegations at the next session of the Subcommittee on this important topic.

Another development at the Subcommittee's last session concerns the registration of space objects. This was the second year for the Subcommittee to review the practice of States and international organizations in registering space objects. Through a multi-year work plan, the LSC is examining State and international organization practice in recording space objects on the United Nations Registry established under the 1976 Convention on the Registration of Objects Launched into Outer Space with the view to identifying common elements.

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Mr. Hodgkins also represented the United States at the meeting of the legal subcommittee of COPUOS ("LSC") in April 2005. In a statement on Agenda Item 6 before the subcommittee on April 7, he reiterated the U.S. view "there is no need to seek a legal definition or delimitation for outer space . . . until there is a demonstrated need and a practical basis for

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developing a definition or delimitation.” As to the geostationary orbit (“GSO”), he stated the U.S. “continuing commitment to equitable access to the GSO by all States, including satisfaction of the requirements of developing countries for GSO use and satellite telecommunications generally,” and explained:

From the legal point of view, it is clear that the GSO is part of outer space and its use is governed by the 1967 Outer Space Treaty (as well as the International Telecommunication Union’s treaties.) As set forth in Article 1 of the Outer Space Treaty, “Outer space . . . shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law. . . .” Article II of this Treaty further states that outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation or by any other means. These articles make clear that a party to the Outer Space Treaty cannot appropriate a position in outer space, such as an orbital location in the GSO, either by claim of sovereignty or by means of use, or even repeated use, of such an orbital position.

\* \* \* \*

Also highly relevant to this agenda item are the ITU Constitution, Convention and Radio Regulations, as well as the current procedures under those authorities for international cooperation among countries and groups of countries. We believe that at the present they fully take into account the interests of States in the use of the geostationary orbit and related radio frequencies. The LSC continues, of course, to have a legitimate interest in this issue, and it is fitting that the issue remain on this Subcommittee’s agenda should further issues arise that are appropriate for resolution in this United Nations body.

The full texts of Mr. Hodgkins’ statements to the legal subcommittee on this and other issues are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

**Cross References**

*Amendments to the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and protocol, Chapters 3.B.1.e. and 18.C.2.d.*

*Maritime counter-narcotics agreements, Chapter 3.B.3.e.*

*Claim to Submerged Lands by CNMI, Chapter 5.B.2.*

*Space equipment finance, Chapter 15.A.5.*



## CHAPTER 13

### Environment and Other Transnational Scientific Issues

#### A. ENVIRONMENT

##### 1. Pollution and Related Issues

###### a. *Devils Lake*

On August 5, 2005, the Department of State issued a joint press statement on Devils Lake flooding and ecological protection by the United States and Canada, North Dakota, Minnesota and Manitoba. Devils Lake is a “closed” basin in northeastern North Dakota. Its level has fluctuated widely and rose 25 feet between 1993 and 2001. In order to protect farms and property, North Dakota proposed creation of an outlet from the lake to the Sheyenne River. Concerns were raised by both Canada and neighboring U.S. states about the possible impact of a new outlet draining into the Sheyenne River, which flows into the Red River and from there along the border with Minnesota and into Canada. The statement outlines undertakings at both national and sub-national levels to address concerns on both sides. The full text of the statement, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/50831.htm](http://www.state.gov/r/pa/prs/ps/2005/50831.htm).

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The United States and Canada today announced that important progress has been made towards addressing flooding in Devils Lake

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while protecting aquatic resources throughout the Red River Basin. Consistent with the history of cooperation under the Canada-US Boundary Waters Treaty, the mutually accepted approach is the product of extensive cross-border consultation and cooperation by North Dakota, Minnesota and Manitoba over several months.

The proposed approach provides for a layered system of environmental safeguards at the Devils Lake outlet and a cooperative approach to monitoring throughout the Red River Basin.

Since 1993, Devils Lake has rapidly risen, growing from 70 square miles to more than 200 square miles and flooding communities, schools and farms. To help control flooding, North Dakota will soon complete construction of an outlet to carry some of this water from Devils Lake to the Sheyenne River.

In response to concerns raised by Canada, Manitoba and Minnesota about the potential for deterioration of water quality and other environmental effects, government experts consulted extensively and worked in close cooperation over the last several months. . . .

Based on this review and the arrangements outlined below, the participants have a higher level of confidence that the outlet can be operated in a manner that will not pose an unreasonable risk to the other parts of the Basin.

To protect against the ongoing risks of any aquatic nuisance species entering the Basin through Devils Lake or through other parts of the watershed, the participants have agreed upon the following layered approach involving both mitigation measures and joint monitoring.

Specifically:

- North Dakota will put in place a rock and gravel intermediate filter before opening the outlet, to prevent the release of macroscopic aquatic nuisance species from Devils Lake;
- The United States and Canada will cooperate in the design and construction of a more advanced filtration and/or disinfection system for the Devils Lake outlet, taking into account the results of ongoing monitoring and risk assessment;
- The participants will work with the International Red River Board, of the International Joint Commission, to develop and implement a shared risk management strategy for the greater Red River Basin, involving an early detec-

tion and monitoring system for water quality and aquatic nuisance species throughout the Basin;

- The participants will take immediate measures to prevent the spread of any aquatic nuisance species that pose significant risk to the Basin, should any be identified;
- The Province of Manitoba will complete tasks associated with mitigating the impacts of the Pembina Border Dike no later than August 31, 2005; and
- To address concerns raised by Canada, Manitoba and Minnesota with respect to an inlet being built from the Missouri River to Devils Lake to help stabilize lake levels, North Dakota affirms it does not have such a current intention, plan or prospective proposal to construct such an inlet; and the US federal government affirms that it is prohibited by federal law from expending funds towards the construction of such an inlet.

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***b. Protection of stratospheric ozone***

Effective January 1, 2005, the U.S. Environmental Protection Agency issued a final rule amending its regulations “to exempt production and import of methyl bromide for critical uses from the accelerated phaseout regulations that govern the production, import, export, transformation and destruction of substances that deplete the ozone layer under the authority of the Clean Air Act (CAA).” 69 Fed. Reg. 76,982 (Dec. 23, 2004). As explained in the summary included in the Federal Register, the amendments “establish the framework for an exemption permitted under the Montreal Protocol on Substances That Deplete the Ozone Layer (Protocol) and the CAA and specify the amount of methyl bromide that may be supplied in 2005 from available stocks and new production and consumption to meet approved critical uses [and] . . . the list of critical uses approved by EPA for 2005.”

Excerpts below from the Federal Register explain the background of the action taken (internal headings omitted).

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. . . The U.S. was one of the original signatories to the 1987 Montreal Protocol and the U.S. ratified the Protocol on April 21, 1988. Congress then enacted, and President Bush signed into law, the Clean Air Act Amendments of 1990 (CAAA of 1990) which included Title VI on Stratospheric Ozone Protection, codified as 42 U.S.C. Chapter 85, Subchapter VI, to ensure that the United States could satisfy its obligations under the Protocol. EPA issued new regulations to implement this legislation and has made several amendments to the regulations since that time.

Methyl bromide is an odorless, colorless, toxic gas, which is used as a broad-spectrum pesticide and is controlled under the CAA as a Class I ozone depleting substance (ODS). Methyl bromide is used in the U.S. and throughout the world as a fumigant to control a wide variety of pests such as insects, weeds, rodents, pathogens, and nematodes. . . .

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Methyl bromide was added to the Protocol as an ozone depleting substance in 1992 through the Copenhagen Amendment to the Protocol. The Parties agreed that each industrialized country's level of methyl bromide production and consumption in 1991 should be the baseline for establishing a freeze in the level of methyl bromide production and consumption for industrialized countries. EPA published a final rule in the Federal Register on December 10, 1993 (58 FR 65018), listing methyl bromide as a class I, Group VI controlled substance, freezing U.S. production and consumption at this 1991 level, and, in Section 82.7 of the rule, setting forth the percentage of baseline allowances for methyl bromide granted to companies in each control period (each calendar year) until the year 2001, when the complete phaseout would occur (58 FR 65018). . . . EPA based its action on scientific assessments and actions by the Parties to the Montreal Protocol to freeze the level of methyl bromide production and consumption for industrialized countries at the 1992 Meeting of the Parties in Copenhagen.



At their 1995 [and] 1997 meeting[s], the Parties agreed to . . . adjustments to the phaseout schedule for methyl bromide in industrialized countries, with reduction steps leading to a 2005 phaseout for industrialized countries. . . . On November 28, 2000, EPA issued regulations to amend the phaseout schedule for methyl bromide and extend the complete phaseout of production and consumption to 2005 (65 FR 70795).

Today, in accordance with the 1998 amendments to the CAA, EPA is further amending 40 CFR Part 82 to implement an exemption to the 2005 phaseout of methyl bromide that allows continued production and consumption of methyl bromide for critical uses. Section 604(d)(6) of the CAA provides that “[t]o the extent consistent with the Montreal Protocol, the Administrator, after notice and the opportunity for public comment, and after consultation with other departments or instrumentalities of the Federal Government having regulatory authority related to methyl bromide, including the Secretary of Agriculture, may exempt the production, importation, and consumption of methyl bromide for critical uses.” 42 U.S.C. 7671c(d)(6). Article 2H(5) of the Montreal Protocol provides that the 2005 methyl bromide phaseout shall not apply “to the extent the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.”

Both Section 604(d)(6) and Section 614(b) of the CAA address the relationship between the Montreal Protocol and actions taken under the CAA’s stratospheric ozone provisions. Section 604(d)(6) addresses critical uses specifically, while Section 614(b) is more general in scope. Section 604(d)(6) states that “to the extent consistent with the Montreal Protocol,” the Administrator may exempt methyl bromide for critical uses. Section 614(b) states: “This title as added by the Clean Air Act Amendments of 1990 shall be construed, interpreted, and applied as a supplement to the terms and conditions of the Montreal Protocol, as provided in Article 2, paragraph 11 thereof, and shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of conflict between any provision of this title and any

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provision of the Montreal Protocol, the more stringent provision shall govern.”

EPA must take into account not only the text of Article 2H but also the related Decisions of the Protocol Parties that interpret that text. Under customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties (8 International Legal Materials 679 (1969)) both the treaty text and the practice of the parties in interpreting that text form the basis for its interpretation. Although the United States is not a party to the 1969 Convention, the United States has regarded it since 1971 as “the authoritative guide to current treaty law and practice.” See Secretary of State William P. Rogers to President Richard Nixon, October 18, 1971, 92d Cong., 1st Sess., Exec. L (Nov. 22, 1971). Specifically, Article 31(1) of the Vienna Convention provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

Article 31(3) goes on to provide that “[t]here shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” In the current circumstances, Decisions of the Parties can be construed as subsequent consensus agreements among the Parties to the Montreal Protocol, including the United States, regarding the interpretation and application of the Protocol.

In accordance with Article 2H(5), the Parties have issued several Decisions pertaining to the critical use exemption. At their Ninth Meeting in 1997, the Parties issued Decision IX/6 which established criteria applicable to the critical use exemption. In paragraph 1 of Decision IX/6, the Parties agreed as follows:

- (a) That a use of methyl bromide should qualify as “critical” only if the nominating Party determines that:
  - (i) The specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and
  - (ii) There are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and health

and are suitable to the crops and circumstances of the nomination;

(b) That production and consumption, if any, of methyl bromide for critical uses should be permitted only if:

(i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;

(ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries' need for methyl bromide;

(iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes, taking into account the circumstances of the nomination \* \* \*

Non-Article V [Developed country] parties must demonstrate that research programmes are in place to develop and deploy alternatives and substitutes \* \* \*. The Parties also agreed in Decision IX/6 that the technical panel (discussed below) that reviews nominations and makes recommendations to the Parties regarding approval of critical use exemptions, would base its review and recommendations on the criteria in paragraphs (a)(ii) and (b). The criterion in paragraph (a)(i) was not subject to review by this technical panel.

At the First Extraordinary Meeting of the Parties in March of 2004, the Parties issued several decisions that address the agreed critical uses, the allowable levels of new production and consumption for critical uses, the conditions for granting critical use exemptions, and reporting obligations. Decision Ex. I/3 covers the agreed critical uses and allowable levels of new production and consumption for the year 2005. This Decision includes the following terms:

1. For the agreed critical uses set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol for each Party, to permit, subject to the conditions set forth in decision Ex. I/4, the levels of production and consumption set forth in annex II B to the

present report which are necessary to satisfy critical uses, with the understanding that additional levels and categories of uses may be approved by the Sixteenth Meeting of the Parties in accordance with decision IX/6;

2. That a Party with a critical-use exemption level in excess of permitted levels of production and consumption for critical uses is to make up any such difference between those levels by using quantities of methyl bromide from stocks that the Party has recognized to be available;

3. That a Party using stocks under paragraph 2 above shall prohibit the use of stocks in the categories set forth in annex II A to the report of the First Extraordinary Meeting of the Parties to the Montreal Protocol when amounts from stocks combined with allowable production and consumption for critical uses exceed the total level for that Party set forth in annex II A to the present report;

4. That Parties should endeavor to allocate the quantities of methyl bromide recommended by the Technology and Economic Assessment Panel as listed in annex II A to the report of the First Extraordinary Meeting of the Parties;

5. That each Party which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting or authorizing the use of methyl bromide and that such procedures take into account available stocks. Each Party is requested to report on the implementation of the present paragraph to the Ozone Secretariat.

The agreed critical uses and allowable levels of production and consumption are set forth in annexes to the Parties' report. Decision Ex I/4 addresses the conditions for granting and reporting critical-use exemption for methyl bromide.

Decisions IX/6, Ex. I/3, and Ex. I/4 are subsequent consensus agreements of the Parties that address the interpretation and application of the critical use provision in Article 2H(5) of the Protocol. For example, Decision Ex. I/3 reflects a decision called for by the text of Article 2H(5) where the parties are directed to "decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses." EPA intends to fol-

low the terms of Decisions IX/6, Ex. I/3, and Ex. I/4. This will ensure consistency with the Montreal Protocol and satisfy the requirements of Section 604(d)(6) and Section 614(b) of the CAA.

With today's final action, EPA is establishing the critical use exemption (CUE) by amending 40 CFR Part 82 to exempt production and import of methyl bromide from the January 1, 2005 phaseout to meet the needs of users who do not have technically and economically feasible alternatives available to them. In today's rulemaking, EPA is describing the framework for the critical use exemption, assigning allowances for critical use methyl bromide, and determining the quantities of exempted methyl bromide allowable under the Clean Air Act (CAA) and the Montreal Protocol.

\* \* \* \*

Effective October 31, 2005, EPA issued a direct final rule "to authorize use of 610,665 kilograms of methyl bromide for supplemental critical uses in 2005 through the allocation of additional critical stock allowances (CSAs)." 70 Fed. Reg. 51,270 (Aug. 30, 2005). The Federal Register explained that

this allocation supplements the critical use allowances (CUAs) and CSAs previously allocated for 2005 [above]. . . . Further, EPA is amending the list of exempted critical uses. With today's action EPA is exempting methyl bromide for critical uses beyond the phaseout under the authority of the [CAA] and in accordance with the Montreal Protocol on Substances that Deplete the Ozone Layer (Protocol). . . . These actions are in accordance with Decision XVI/2 of the countries that have ratified the Montreal Protocol . . . taken at their November 2004 meeting.

**c. *Persistent organic pollutants***

The Conference of the Parties of the Stockholm Convention on Persistent Organic Pollutants held its first meeting in Punta del Este, Uruguay, from May 2-6, 2005. On May 5, Claudia A. McMurray, Deputy Assistant Secretary of State for Environment and head of the U.S. delegation to the meeting,

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addressed the conference as excerpted below. The full text of Ms. McMurray's remarks is available at [www.state.gov/g/oes/rls/or/45802.htm](http://www.state.gov/g/oes/rls/or/45802.htm).

\* \* \* \*

The United States was a leader in pushing for a global treaty to address the very real risks posed by these highly toxic chemicals. In fact, the proposal to negotiate this agreement was first made in 1995 at the Washington Conference on Land-Based Sources of Marine Pollution, which the United States hosted. We took a leading role and actively participated in and supported the negotiations over the six year period that concluded with the Stockholm Convention. Today, the United States remains as committed as ever to this important global environmental agreement.

In 2001, President Bush strongly endorsed the Stockholm Convention and directed his Administration to work with our Congress to secure the legislative changes required to ratify the accord. The Convention's ratification continues to be an extremely high priority for this Administration. Because of our complex domestic legislative process, which involves the work of several important Congressional committees, U.S. ratification has taken longer than anticipated. As a consequence, we regrettably were not able to become a party to the Convention before this meeting. There remains strong and broad-based domestic support for this international agreement in the United States, including from industry, the agricultural community and non-governmental organizations. It is our strong hope that the domestic ratification process will be completed as soon as possible so that the United States can participate as a Party at the next Stockholm Convention Conference of the Parties.

Current science demonstrates that we in the global community were right to develop this agreement. In the United States we continue to see evidence of significant deposition of certain POPs chemicals in remote regions, far from any sources of their production and use. Concentrations of some substances are increasing even though the United States banned or severely restricted the chemicals covered by the Stockholm Convention decades ago. The risks are especially high for our indigenous populations, who rely heavily on certain fish, marine mammal, and wildlife species.

The impacts of these chemicals on the countries and regions where they remain in production and use are even more severe. The problems are particularly acute in developing countries, many of which lack the means to develop and utilize alternatives to several of the POPs chemicals. This situation provides an excellent opportunity for developed and developing countries to work together to address a common concern. The United States has already spent over \$20 million assisting several developing countries in building capacity in this area. In addition, the Stockholm Convention itself includes a flexible system of financial and technical assistance for developing countries, using the Global Environment Facility as the interim funding mechanism. We intend to continue supporting these and other efforts to promote the sound management of POPs in those countries that still use them.

While we have been meeting here this week, the United States has worked hard with other countries to ensure that effective scientific and technical procedures are adopted for implementing the agreement. These procedures in reality will form the bedrock for the future of the Stockholm Convention. . . .

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**d. *Climate change***

The Conference of the Parties ("COP") to the UN Framework Convention on Climate Change held its 11th Session in Montreal from November 28 to December 9, 2005. Because the Kyoto Protocol entered into force on February 16, 2005, the Montreal meeting also constituted the first Meeting of the Parties ("MOP") to the protocol. In remarks to the Conference of the Parties Plenary on November 28, 2005, Dr. Harlan L. Watson, Senior U.S. Climate Negotiator, addressed certain procedural aspects of keeping the two meetings appropriately focused. The full text of his remarks, excerpted below, is available at [www.state.gov/g/oes/rls/rm/57456.htm](http://www.state.gov/g/oes/rls/rm/57456.htm).

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This is the first time that the Conference of the Parties under the Framework Convention has taken place concurrently with the meeting of the Parties under the Kyoto Protocol. Thus, to ensure the effective operation of these two bodies, it will be important to maintain a clear separation between Convention issues and Kyoto Protocol issues, in light of the legally distinct nature of these separate instruments.

\* \* \* \*

The conclusions from [the 19<sup>th</sup> Meeting of the Subsidiary Body for Implementation] do not address how the determination will be made as to whether an issue falls under the Framework Convention or the Kyoto Protocol. We see three considerations:

First, if an issue is directly linked to a specific article of the Convention or of the Protocol, it clearly falls under that instrument.

Second, if an issue arises as the result of a decision under the Convention or under the Protocol, the issue should relate to the instrument under which the decision was taken. For example, the report on Carbon Capture and Storage was called for under a decision of the COP/moP. Accordingly, it should be seen as an issue under the Kyoto Protocol, not the Convention. In this regard, we acknowledge that past COP decisions generated Protocol issues. In the future, however, COP decisions will generate only Convention issues.

Third, if the substance of an issue is tied to the Framework Convention or to the Kyoto Protocol, the issue—or decision—should relate to the instrument to which the substance is tied. For example, COP decision 13/CP.7 on Policies and Measures (PAMs) is tied directly to the Kyoto Protocol by references to article 2, paragraph 1(b) of the Kyoto Protocol. Alternatively, an agenda item may be linked to one instrument or the other if it deals substantively with activities relating to one body or the other—for example, Capacity Building under the Convention.

\* \* \* \*

On December 2, 2005, Dr. Watson thanked the Conference President, Canadian Environment Minister Stéphane Dion, for preparation of a draft document addressing long-term cooperative action to address climate change. Dr. Wat-



son also presented the U.S. views, as excerpted below. The full text of Dr. Watson's remarks is available at [www.state.gov/g/oes/rls/rm/57688.htm](http://www.state.gov/g/oes/rls/rm/57688.htm).

\* \* \* \*

We are pleased to be contributing to the on-going consideration of a five-year programme on adaptation and continuation of the work on mitigation under the [UN Framework Convention on Climate Change] in [the Subsidiary Body for Scientific and Technological Advice] and are optimistic that we will have a package that can be accepted by all Parties.

We also recognize that Kyoto Parties are legally obligated to commence discussions here in Montréal on a second commitment period, which for them would presumably begin in 2013. We respect that obligation and expect that they will meet their commitment to do so. However, the United States is opposed to any such discussions under the Framework Convention.

We are involved in climate discussions on an ongoing basis through many government and non-governmental venues, including the G8 and bilateral and regional discussions with other countries.

These engagements provide many opportunities for countries to join together to discuss climate policy, often focusing on practical steps to address climate change such as accelerating the development and deployment of advanced energy technologies.

Within the Framework Convention, we have had numerous informal conversations about approaches and have welcomed our ability to participate in and learn from the discussions that have taken place during official COP roundtables and the Seminar of Government Experts in Bonn last May.

However, formalized processes under the Framework Convention—such as is proposed in this non-paper—or formalized discussions under the Framework Convention—such as proposed by some Parties—are in fact negotiations. The U.S. position remains consistent: we see no change in current conditions that would result in a negotiated agreement consistent with the U.S. approach.

The United States seeks to focus attention on progress toward the shared objectives of the Framework Convention rather than to

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detour positive approaches toward a new round of discussions or processes that will inevitably result in negotiations. We do not support such an approach.

U.S. climate policy is founded upon the conviction that actions bring results. We believe that it is best to address this complex issue through a range of programs and technology initiatives that address climate change issues through partnerships based upon both near-term and longer-term sustainable development and clean energy objectives.

In remarks to the Opening Plenary on December 7, 2005, Dr. Paula Dobriansky, Under Secretary for Democracy and Global Affairs and head of the U.S. delegation, summarized the U.S. approach to climate change, as excerpted below. The full text of Dr. Dobriansky's remarks is available at [www.state.gov/g/rls/rm/2005/57830.htm](http://www.state.gov/g/rls/rm/2005/57830.htm).

\* \* \* \*

. . . We remain committed to the UN Framework Convention on Climate Change. Its ultimate objective underpins the full range of U.S. actions.

To address near-term and long-term aspects of climate change, we are:

- reducing greenhouse gas intensity by 18 percent by 2012;
- making major investments in science and technology; and
- cooperating internationally to develop an effective global response.

\* \* \* \*

Our common challenge is to address climate change while promoting development. Success requires placing climate actions in a broad agenda that promotes economic growth & energy security, reduces poverty & pollution, and mitigates emissions. G8 leaders endorsed such an approach during July's Gleneagles Summit. The G8 outcome demonstrates that international support exists for taking actions that are both good for people and good for the environment.

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***e. Gothenburg Protocol***

The Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution ("LRTAP") to Abate Acidification, Eutrophication and Ground-Level Ozone, done at Gothenburg, Germany, November 30, 1999 ("Gothenburg Protocol") entered into force May 17, 2005. The United States signed an instrument of acceptance in 2004. *See Digest 2004* at 744-45.

**2. Protection of the Marine Environment and Marine Conservation**

***a. Oceans***

On November 28, 2005, Ambassador David A. Balton delivered a statement in the UN General Assembly supporting most aspects of a resolution entitled "Oceans and the Law of the Sea" co-sponsored by the United States. The resolution was adopted by recorded vote on November 29, 2005. UN Doc. A/RES/60/30 (2005).

The full text of Ambassador Balton's remarks, excerpted below, is available at [www.un.int/usa/o5\\_232.htm](http://www.un.int/usa/o5_232.htm).

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[Concerning] the resolution on oceans and the law of the sea, we are pleased with the progress made on an array of diverse issues.

The February ad hoc informal open-ended meeting on marine biodiversity beyond national jurisdiction will be an opportunity for the international community to discuss some complex issues. We look forward to a productive exchange of information and ideas.

We are pleased with the decision contained in this resolution to renew the mandate of the UN Informal Open-ended Consultative Process on Oceans and Law of the Sea. The annual ICP meetings have proven helpful in expanding the international community's knowledge and awareness of emerging issues affecting the world's

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oceans. Our decision to focus on ecosystems approaches and oceans in next year's meeting will, we believe, follow in that helpful mode. We thank our distinguished Canadian colleagues for suggesting that topic.

This resolution recognizes that the work of the Commission on the Limits of the Continental Shelf will become increasingly significant as more States initiate the process of establishing the boundaries of their continental shelves. We look forward to further clarity with respect to information offered for the Commission's consideration.

Among all of the positive outcomes of this resolution there is one, however, where we feel compelled to note a concern for possible future trends. This resolution is not the best or most appropriate vehicle for the complex issue of transshipment of radioactive materials. Although we recognize the importance many delegations—particularly those from Small Island Developing States—attach to this issue, it is such a technical and difficult one, that, to be given fair consideration, it must be raised in organizations better equipped to do so. Those organizations are the International Atomic Energy Agency and the International Maritime Organization. We would encourage all UN member states particularly interested in the issue to join those organizations.

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### ***b. Pollution from ships***

At its 52nd session, held October 11-15, 2004, the Marine Environment Protection Committee of the International Maritime Organization adopted revised MARPOL Annex I "Regulations for the prevention of pollution by oil." Among other things, the revised annex included regulations on the phasing-in of double hull requirements for oil tankers. See [www.imo.org/About/mainframe.asp?topic\\_id=848&doc\\_id=4405#1](http://www.imo.org/About/mainframe.asp?topic_id=848&doc_id=4405#1).

In keeping with the resolution adopting Revised Annex I (MEPC.117(52)) which provides that each regulation of the revised Annex I is subject to separate consideration by the Parties, on January 25, 2005, the United States delivered a diplomatic note to the Secretary-General of the IMO stating that the express approval of the Government of the United

States of America will be necessary before Regulations 19, 20, and 21 of the revised Annex I, pertaining to the phase-out of single hull oil tankers, can enter into force for the United States. This action was necessary because there are important differences between these regulations and U.S. law reflected in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

The U.S. note is reprinted in IMO Doc. A1/U/3.37 (June 2, 2005), available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). See also IMO Doc. MEPC/Circ.430 (Mar. 3, 2005), attaching a letter from the U.S. Coast Guard advising the Secretary-General "of the U.S. implementation plan to prepare U.S. flagged tank vessels for the pending implementation of MARPOL 73/78, Annex I regulations 13G and 13H (as amended)," available at [www.imo.org/includes/blastDataOnly.asp/data\\_id%3D11545/430.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11545/430.pdf).

**c. Marine wildlife**

**(1) *Convention concerning migratory fish stock in the Pacific Ocean***

On May 16, 2005, President Bush transmitted the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, with Annexes ("the WCPF Convention") to the Senate for advice and consent to ratification. S. Treaty Doc. 109-1 (2005). The Convention was adopted at Honolulu on September 5, 2000, and was signed on behalf of the United States on that date. It entered into force on June 19, 2004, six months after the deposit of the thirteenth instrument of ratification, acceptance, approval or accession, as provided in Article 36. Among other things, the convention establishes a new international fisheries organization, known as the WCPF Commission, to conserve and manage tunas and related species in that portion of the Pacific Ocean not covered by the Inter-American Tropical Tuna Commission ("IATTC"). In testimony in support of Senate advice and consent to ratification of the treaty before the

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Senate Foreign Relations Committee on September 29, 2005, Ambassador David Balton explained that

[t]he United States played a lead role during the negotiations on a wide range of issues. One such issue was the effort to afford membership in the Commission to Taiwan under the terms of [a] separate instrument. . . . As a result, for the first time in any regional fisheries organization, vessels from Taiwan will be bound by the terms of the Convention, including the conservation and management measures adopted pursuant thereto. Similar arrangements were subsequently included in the Antigua Convention. . . .

The full text of Ambassador Balton's testimony is available at [www.state.gov/g/oes/rls/rm/54128.htm](http://www.state.gov/g/oes/rls/rm/54128.htm). The testimony also supported advice and consent to ratification of the Agreement with Canada on Pacific Hake/Whiting (S. Treaty Doc. No. 108-24 (2004), discussed in *Digest 2004* at 753-55); the Antigua Convention (discussed in (2) below); and the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 thereto (MARPOL Annex VI) (S. Treaty Doc. 108-7 (2003), discussed in *Digest 2003* at 783-88).

Excerpts below from the report of the Secretary of State submitting the convention to the President, and included in S. Treaty Doc. 109-1, provide the views of the United States on certain aspects of the convention. The Senate provided advice and consent to ratification of the WCPF Convention on November 17, 151 CONG.REC. S13282 (2005). *See also* Chapter 4.B.2. concerning U.S. role as cooperating non-member.

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The WCPF Convention has as its objective the long-term conservation and sustainable use of highly migratory fish stocks of the Western and Central Pacific Ocean. Highly migratory fish stocks are those that migrate across extensive areas of the high seas as well as through the territorial seas and exclusive economic zones (EEZs) of

numerous coastal States. Examples include species of tuna, swordfish, marlin, and related highly migratory species. The fisheries for tuna in the Western and Central Pacific are the largest and most valuable in the world.

The WCPF Convention builds upon provisions of the 1982 United Nations Convention on the Law of the Sea (the LOS Convention) and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the UN Fish Stocks Agreement).

The LOS Convention recognizes that effective conservation and management of highly migratory fish stocks requires cooperation among those with a direct interest in them: coastal States with the authority to manage fishing in their EEZs, as well as those nations whose vessels fish for these stocks within EEZs or on the high seas. It obligates such States in the regions where fishing for highly migratory species takes place to cooperate directly or through appropriate international organizations to ensure conservation and promote the sustainable utilization of such species throughout their ranges, both within and beyond the EEZ. It calls for cooperation to establish international organizations in regions where no appropriate body exists.

The UN Fish Stocks Agreement elaborates and strengthens the provisions of the LOS Convention regarding highly migratory species. Among other things, it contains a requirement that the coastal States and States whose vessels fish for highly migratory species in a region where no regional fishery management organization or arrangement exists, establish such an organization or arrangement. The Western and Central Pacific Ocean is the last major marine area with extensive fishing for highly migratory species that lacks such a regional organization. The WCPF Convention is designed to fill this gap. A number of its provisions are drawn directly from the UN Fish Stocks Agreement.

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The participants faced a number of difficult and complex issues in translating the general international legal obligations to conserve

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and cooperate in the conservation of highly migratory fish stocks into a practical and effective management regime. These ranged from the nature and decision-making procedures of the regime's institutions to effective mechanisms to ensure compliance with the provisions of the WCPF Convention and measures adopted pursuant to it. They also faced potentially intractable political issues relating to how Taiwan—with the second largest fishing fleet in the region—and non-self governing territories, such as French Polynesia and New Caledonia, would participate in the Convention.

Solutions to these issues required finding an equitable balance between coastal States, most particularly FFA members wary of any limitation of their sovereign rights in their EEZs, on the one hand, and the distant water fishing States, most particularly Asian fishing nations and entities (Japan, the Republic of Korea, China and Taiwan), on the other, which sought to avoid what they perceived as onerous burdens on their industries and concerns about being out-voted by the more numerous coastal States.

The United States occupied the middle ground in the negotiation as both a major distant water fishing nation (with the fourth largest catch in the region) and a coastal State with the largest EEZ in the Convention Area (including waters around Hawaii, American Samoa, Guam and the Northern Mariana Islands). Moreover, the United States enjoys a close relationship on fisheries matters with the FFA members collectively. This relationship is reflected in the 1987 Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, as amended, which establishes regional licensing and access arrangements for U.S. tuna vessels in the Western and Central Pacific. It includes a number of innovative conservation and compliance features that influenced the content of the WCPF Convention.

The position occupied by the United States in the negotiations afforded the U.S. delegation opportunities and incentives to play an active role in securing an appropriate balance between coastal and distant water interests in the WCPF Convention. Additional key objectives for the United States included the creation of a level playing field—ensuring that all significant fishing fleets in the region are bound by uniform and effective conservation obligations—and en-



suring as far as possible that the highly migratory stocks of the region are managed throughout their range.

The final session of the [Multilateral High Level Conference on the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean] MHLC on September 5, 2000, adopted the WCPF Convention, incorporating what most participants viewed as fair and workable provisions on the key issues, along with a resolution (Resolution 1) convening a Preparatory Conference to prepare for the establishment of the Commission provided for in the WCPF Convention. Due to objections by Japan, supported by the Republic of Korea, the WCPF Convention could not be adopted by consensus and was put to a vote. It was adopted by a vote of 19 in favor and two opposed (Japan and the Republic of Korea), with three abstentions (China, France and Tonga).

\* \* \* \*

As a result of the work of the Preparatory Conference, the consensus that eluded the participants on adoption of the Convention now appears to have been achieved, with almost all of those who took part in the MHLC negotiations now Party to the WCPF Convention and committed to its success.

The Convention entered into force on June 19, 2004, six months after New Zealand deposited the thirteenth instrument of ratification. To date, sixteen States have ratified or acceded to the Convention. In addition, in November 2004 Taiwan (Chinese Taipei) completed its domestic requirements to become Party to the Convention as a “fishing entity” and, in accordance with Article 9 of the WCPF Convention, became a member of the Commission. This brings the number of States and fishing entities Party to the WCPF Convention to seventeen. The inaugural meeting of the Commission took place in December 2004, and the first annual meeting is scheduled for December 2005. As a result, I believe that it is important for the United States to take the steps necessary to join the new Commission at the earliest possible time.

The WCPF Convention consists of 43 articles and four Annexes. . . .

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### Part I—General Provisions (Articles 1-4)

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In delineating the Convention Area, account had to be taken of the existence of other agreements dealing with highly migratory species in the Pacific, as well as the complex geographic and legal situation regarding waters off the coasts of Southeast Asia. In the east, the Convention Area abuts waters subject to regulation by the Inter-American Tropical Tuna Commission (IATTC). The southern limits follow the northern limits of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), while the northern limit of the Convention area is self-defining.

With respect to the Convention area's western limit, there is no generally agreed upon definition of the extent of Pacific waters in the East and Southeast Asian area, among other reasons, because of intractable disputes over maritime boundaries in the South China Sea and elsewhere. Article 3, therefore, does not set forth a specific western limit of the WCPF Convention area. Rather, it provides (Paragraph 3) that conservation and management measures shall be applied throughout the range of the stocks, or to specific areas within the WCPF Convention area, as determined by the WCPF Commission. In other words, it is recognized that the most practical approach is to provide for the WCPF Commission to address specific western limits in relation to those specific conservation and management measures whose scope or content requires it.

The area of the WCPF Convention was a contentious issue in the negotiations. There was initially strong sentiment in favor of limiting the area to those waters south of latitude 20° north. This view reflected concern on the part of FFA members to retain a South Pacific focus in the WCPF Convention, as well as concern by Asian fishing States over inclusion of waters off their coasts and stocks found primarily in this northern area (e.g., northern albacore and Pacific bluefin tuna). The United States, among others, strongly advocated inclusion of waters north of latitude 20° north, since the range of important stocks (e.g., skipjack, yellowfin and bigeye tuna stocks) extends into these waters. Excluding this area would have left such stocks unmanaged through a significant portion of their range and would not have covered the exclusively

northern stocks at all. The resulting Convention area does include the waters under U.S. jurisdiction around the State of Hawaii and the U.S. Pacific territories. However, measures adopted under the Convention will not affect U.S. law with respect to foreign fishing activities within the EEZ of the United States.

Agreement on the text of Article 3 providing for inclusion in the WCPF Convention area of all waters of the western and central Pacific (including the northern area) was linked to the establishment of a semi-autonomous committee (known as the Northern Committee) with specific responsibilities for the area north of latitude 20+ north, to consist of Commission members located or fishing there (see Article 11 below). This compromise reflects the specific circumstances of the northern area without arbitrarily dividing the Convention Area, which would have undercut efforts aimed at the conservation and management of major tuna populations throughout their range and would have unnecessarily fragmented the management of highly migratory species in the Pacific.

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## Part II—Conservation and Management of Highly Migratory Fish Stocks (Articles 5-8)

Article 5 sets forth general principles and measures for the conservation and management of highly migratory fish stocks in the WCPF Convention area, including obligations upon members of the Commission to:

- adopt measures to ensure the long-term sustainability of the stocks and promote their optimum utilization;
- base such measures on the best scientific evidence available;
- apply the precautionary approach;
- assess the impacts of fishing and other relevant impacts on target stocks and non-target species and the ecosystems of which they are part;
- adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species, and impacts on associated or dependent species, in particular endangered species, and also to

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promote selective and environmentally sound fishing gear and practices;

- take measures to prevent or eliminate over-fishing and excess fishing capacity;
- collect and share complete, accurate and timely data concerning fishing activities; and
- ensure compliance with conservation and management measures through effective monitoring, control and surveillance.

Article 6 elaborates the obligation to apply the precautionary approach to fisheries management (set forth in Article 5). . . .

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### Part III—Commission for the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

#### Section 1—General Provisions (Articles 9-11)

Article 9 provides for establishment of the WCPF Commission and deals with a number of organizational issues, including meetings, election of officers, the Commission's legal capacity, privileges and immunities of the Commission and its officers and adoption of rules of procedure.

Article 9, paragraph 2, in combination with Annex I of the WCPF Convention—Fishing Entities—addresses participation in the WCPF Convention by a “fishing entity.” The term, drawn from the UN Fish Stocks Agreement, refers to Taiwan (Chinese Taipei). These provisions incorporate compromise formulations to ensure that fishing vessels of Taiwan are legally bound by the conservation and management regime of the WCPF Convention, including measures adopted pursuant to it. The compromise had to balance two opposing realities: first, the necessity for Taiwan to take part in the work of the Commission, including decision-making, in order for resulting measures to be binding upon its vessels; and second, the fact that a number of the participants in the negotiations (not least China) do not have diplomatic relations with Taiwan and do not recognize it as having the capacity to become a Contracting Party to international agreements, such as the WCPF Convention.

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Section 6—Decision-making (Article 20)

The WCPF Convention's procedures on decision-making represent a careful balance between Members' interest in having their views reflected in decisions and their interest in not permitting any single Member to block moving forward on important conservation decisions. In the exceptional case where consensus may not be possible, the chambered voting system balances the interests of distant water fishing states and coastal states. The system created by the provisions of the Convention ensures, with all reasonable certainty, that distant water fishing states will not be bound by significant measures to which they do not agree. At the same time, it ensures that failure to reach consensus will not prevent the adoption of important measures that may be necessary for the conservation and management of the resources in question. The provisions of the Convention serve the interests of the United States, as both a distant water fishing nation and a coastal state in the Convention Area, by offering protections for decisions on issues of significant importance to the United States, while not creating a system where necessary conservation and management measures for fisheries stocks of economic value to the U.S. fishing industry could not be adopted.

\* \* \* \*

Part V—Duties of the Flag State (Article 24)

\* \* \* \*

[Among other things], Article 24 calls for the establishment of a WCPF Convention Vessel Monitoring System (VMS), in recognition of the contribution to effective compliance that can be made by placement of near real-time satellite position-fixing transmitters on board fishing vessels. To this end, each member of the WCPF Commission is to require its vessels fishing for highly migratory species on the high seas in the WCPF Convention area to use such transmitters. The WCPF Commission is called upon to operate the VMS for all such vessels. The Commission is to develop standards, specifications and procedures for the use of the transmitters, as well as procedures

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for receiving information through the VMS. The WCPF Convention requires that such procedures include measures to protect the confidentiality of information received by the WCPF Commission, and provides that information transmitted through the VMS be received directly by the Commission and simultaneously by the flag State of the vessel where the flag State so requires.

This latter point was the subject of considerable debate during the negotiations, with several participants calling for VMS information from fishing vessels to be transmitted to the flag State and then to the WCPF Commission. The text of the WCPF Convention on this point—with the possibility of simultaneous receipt of information by the WCPF Commission and the flag State—is designed to ensure that all vessels fishing on the high seas are treated equally and to avoid any appearance that fishing vessel position data could be altered prior to receipt by the Commission. Development of an operational VMS by the WCPF Commission will involve significant work on technical aspects as well as on procedures.

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### Part XII—Final Provisions (Articles 34-44)

Article 43 deals with the complex issue of the participation by territories in the work of the WCPF Commission. This issue was a difficult one in the negotiations since several territories—specifically French Polynesia and New Caledonia—have attained competence for certain matters covered by the WCPF Convention and their political status continues to evolve. French Polynesia and New Caledonia, supported by France, strongly argued that all three should have decision-making authority within the WCPF Commission. The United States took the view that, while there was some divided competence between France and its territories, the territories did not have sufficient authority to give effect to the obligations set forth in the WCPF Convention, including the authority to enter into legally binding international agreements in respect of those obligations, and thus did not meet the test for decision-making status in the WCPF Commission. For both the United States and New Zealand, the matter also raised issues of potential de facto discrimination against their territories—American Samoa, Guam and the

Northern Mariana Islands for the United States and Tokelau for New Zealand.

The solution to the issue was based, in part, on the tradition of other Pacific institutions that have offered full participation short of voting rights to territories and, in part, on deferring aspects of the issue by agreeing to continue consideration of the matter in light of the evolution of the competence of territories in relation to rights and obligations under the WCPF Convention.

Article 43 reflects this solution. The WCPF Commission and its subsidiary bodies are to be open to participation by each of the following, subject to the appropriate authorization of the Contracting Party having responsibility for their respective international affairs:

- American Samoa
- French Polynesia
- Guam
- New Caledonia
- Northern Mariana Islands
- Tokelau
- Wallis and Futuna

Consistent with this provision, the United States intends to authorize the participation of American Samoa, Guam and the Northern Mariana Islands. The Convention provides for the nature and extent of such participation to be set out in separate rules of procedure, taking into account international law, the distribution of competences on matters covered by the WCPF Convention and the evolving capacity of the territory to exercise rights and responsibilities under the Convention. Article 43 sets forth two additional principles and thus directs their incorporation in these separate rules of procedure: first, that all participating territories shall be entitled to participate fully in the work of the WCPF Commission, including the right to be present and speak at meetings of the Commission and its subsidiary bodies; and second, that the WCPF Commission, in the performance of its functions and taking decisions, shall take into account the interests of all participants.

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For its part, the United States has begun to undertake consultations with representatives of American Samoa, Guam and the Northern Mariana Islands with respect to their participation in the work of the WCPF Commission as Participating Territories should the United States become a Contracting Party to the WCPF Convention.

\* \* \* \*

The WCPF Convention is consistent with and, in fact, promotes the objectives of U.S. domestic fisheries legislation, including the Magnuson-Stevens Fishery Conservation and Management Act, as amended, (16 U.S.C. 1801 et seq.). At the same time, in order for the United States to implement the WCPF Convention fully, legislation will be required, inter alia, to provide for the organization of U.S. participation in the WCPF Commission and to make conservation and management measures adopted by the WCPF Commission legally binding upon nationals and vessels subject to U.S. jurisdiction.

As is evident in this Report, the Convention on the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean creates legal obligations and cooperative mechanisms necessary for the long-term conservation and sustainable use of fishery resources of worldwide importance. It offers the opportunity to meet these objectives before the resources become subject to the pressures of over-fishing that are so evident elsewhere in the world's oceans—though the signs of such pressures are already on the Western and Central Pacific horizon. The United States has direct and important interests in this Convention and its early and effective implementation. The U.S. tuna industry, long a major and responsible player in the region, and U.S. citizens, particularly our Pacific island residents, have basic stakes in the health of the oceans and their resources as promoted by this Convention.

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### *(2) Convention Strengthening the Inter-American Tuna Commission*

The Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Conven-



tion between the United States of America and the Republic of Costa Rica, with Annexes, (the "Antigua Convention"), was adopted on June 27, 2003, in Antigua, Guatemala, by the Parties to the 1949 Convention. The United States signed the Antigua Convention the day it was opened for signature, November 14, 2003. On March 16, 2005, President Bush transmitted the convention to the Senate for advice and consent to ratification. S. Treaty Doc. 109-2 (2005). As noted in the President's letter,

[t]he United States, which played an instrumental role in negotiation of the revised Convention, has direct and important interests in the Antigua Convention and its early and effective implementation. United States fishing concerns, including the U.S. tuna industry, U.S. conservation organizations, and U.S. consumers, as well as those people who reside in those U.S. States bordering the Convention Area, have crucial stakes in the health of the oceans and their resources as promoted by the Antigua Convention.

Pursuant to Article XXXVII of the Antigua Convention, the United States, which is the depositary of the 1949 Convention, will serve as depositary of the new convention.

Excerpts below from the letter of Secretary of State Colin L. Powell submitting the convention to the President, and included in the transmittal to the Senate, explain the effect of the new convention. On November 17, 2005, the Senate provided its advice and consent to ratification. 151 CONG. REC. S13282 (2005).

\* \* \* \*

The objective of the Antigua Convention is to ensure the long-term conservation and sustainable use of highly migratory fish stocks in the Eastern Pacific Ocean (EPO). Highly migratory fish stocks are those species that migrate across extensive areas of the high seas as well as through the 200 nautical mile exclusive economic zones (EEZs) of numerous coastal States. Examples of such species include tunas and swordfish, which are of considerable commercial value to the United States and other countries of the region. Effective man-

agement of these shared resources, and of the marine ecosystem that supports them, requires concerted international cooperation.

The Antigua Convention updates and revises the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington May 31, 1949 (“the 1949 Convention”), as amended. In so doing, the Antigua Convention draws upon the 1982 United Nations Convention on the Law of the Sea (“the LOS Convention”) and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“the UN Fish Stocks Agreement”). In addition, the substantive provisions of the Antigua Convention are fully consistent with other fisheries conservation and management agreements accepted by the United States, including the 1995 FAO Code of Conduct for Responsible Fisheries (“the Code of Conduct”), the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (“the Compliance Agreement”), and the 1998 Agreement on the International Dolphin Conservation Program (“the AIDCP”).

\* \* \* \*

The Antigua Convention is a comprehensive agreement to promote the long-term economic and environmental sustainability of the living marine resources in the EPO. . . . [T]he Convention improves on the original 1949 Convention by providing for the full participation of non-state actors, including the European Union (EU) and Taiwan, in the work of the IATTC. The EU is entitled to become a Party to the revised Convention in its capacity as a “regional economic integration organization” to which its Member States have transferred competence over matters governed by the Convention. Taiwan, though not eligible to become a Party, may participate as a “Member of the Commission,” in its capacity as a “fishing entity,” under the name Chinese Taipei. Participation by these non-state actors provides important benefits by binding vessels operating under their respective jurisdictions to the conservation and management measures adopted by the IATTC.

The Antigua Convention will also strengthen the ability of the IATTC to address the issue of illegal, unreported, and unregulated (IUD) fishing. The provisions of the Convention pertaining to compliance and enforcement, for example, provide authority for the organization to ensure adherence to the measures it will adopt.

In addition, the Antigua Convention provides for enhanced science, data collection, and monitoring in support of management efforts.

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The Antigua Convention contains provisions whose implementation will require amendments to domestic legislation before they can be fully implemented by the United States. The Administration will work with Congress to develop appropriate amendments to relevant statutes for this purpose.

\* \* \* \*

On this last point, the article-by-article analysis included with the Secretary's letter explained that

Article XVIII.1 requires each Party to take the measures necessary to ensure the implementation of and compliance with the Antigua Convention and any conservation and management measures adopted pursuant thereto, including the adoption of the necessary laws and regulations. For the United States, new legislation will be required to update and modernize Chapter 16, Tuna Conventions, of Title 16 U.S. Code and repeal Chapter 16B, Eastern Pacific Tuna Fishing (as the Convention this chapter was intended to implement will not enter into force). Conforming amendments will be necessary to 50 CFR Subpart C—Pacific Tuna Fisheries, sec. 300.20-300.29.

Among other things, the article-by-article report also contained the following explanations of the application of the "precautionary approach" for conservation, management and sustainable use in the convention and certain aspects of participation in the IATTC by the United States and by the EU and Taiwan.

\* \* \* \*

Article IV.1 requires the members of the Commission, directly and through the Commission, to apply the “precautionary approach” for the conservation, management and sustainable use of fish stocks covered by the Antigua Convention. Article IV.1 requires the “precautionary approach” to be used as described in the relevant provisions of the Code of Conduct for Responsible Fisheries and/or the 1995 UN Fish Stocks Agreement.

Article IV.2 of the Antigua Convention requires the members of the Commission to be more cautious when information is uncertain, unreliable or inadequate. The paragraph also provides that the absence of adequate scientific information is not to be used as a reason for postponing or failing to take conservation and management measures. An identical provision appears in article 6.2 of the 1995 UN Fish Stocks Agreement and a similar provision appears in article 7.5.1 of the Code of Conduct.

(It should be noted that Article VII.1(m), which relates to the functions of the Commission, contains a cross-reference to Article IV. Specifically, in addition to requiring the Commission to apply the precautionary approach in accordance with Article IV, it specified that, in cases where measures are adopted by the Commission pursuant to the precautionary approach in the absence of adequate scientific information, the Commission is required, as soon as possible, to undertake to obtain the scientific information necessary to maintain or modify any such measures.)

Article IV.3 requires the members of the Commission to subject target stocks and non-target or associated or dependent species that are of concern to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. The members are required to revise those measures regularly in light of new scientific information that becomes available. A similar provision appears in article 6.5 of the 1995 UN Fish Stocks Agreement.

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Article VI.3 . . . provides that the immunities and privileges that the Commission and its officers enjoy shall be subject to an agreement between the Commission and the relevant member, in this

case the United States. There is no similar provision in the 1949 Convention.

The Department has determined that implementation of this provision will not require the development of an agreement per se. Pursuant to Executive Order 11059, October 23, 1962, 3 CFR 650-651 (1959-1960 Comp.), President Kennedy designated the IATTC as a “public international organization” entitled to enjoy the privileges, exemptions and immunities conferred by the International Organizations Immunities Act, 22 U.S.C. Sec. 288, except those conferred pursuant to Section 4(b), 4(e) and 5(a) of that Act. Under this authority, the United States has been providing, and will continue to provide, appropriate privileges and immunities to the IATTC.

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### *(3) Sustainable fisheries*

On November 29, 2005, the UN General Assembly adopted Resolution 60/31, “Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments.” Ambassador Balton provided the views of the United States in supporting the resolution on November 28, 2005, as excerpted below. His remarks are available in full at [www.un.int/usa/05\\_232.htm](http://www.un.int/usa/05_232.htm).

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A key element of the fisheries negotiations again this year is the protection of certain sensitive underwater features and vulnerable marine ecosystems from the impacts of fishing. We view the enhanced language in the resolution as underscoring the importance to the international community of addressing this issue, thus safeguarding the biodiversity of these fragile and rare marine ecosystems. In particular, the resolution continues to call upon States and regional fisheries management organizations to urgently take ac-

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tion to regulate bottom fisheries and the impacts of destructive fishing practices through the adoption of appropriate conservation and management measures. The resolution also strengthens provisions calling for a report on this issue to be used by the General Assembly next year. Mr. President, the United States is encouraged by recent progress in addressing the impacts of fishing on vulnerable marine ecosystems by both States and regional fisheries management organizations. We will continue to work cooperatively with all States in those international bodies engaged in regulating fisheries to give effect to these provisions.

This year's fisheries resolution continues to lay the foundation for the Review Conference mandated by the 1995 UN Fish Stocks Agreement. The Review Conference represents the best opportunity for strengthening implementation of this vital agreement with the goal of securing sustainable fisheries worldwide. It is imperative that we seize this opportunity. The United States strongly supports increasing membership in the Agreement and hopes all States that have not yet done so consider becoming parties in advance of the Review Conference. We also support the calls in this year's resolution for renewed efforts to achieve sustainable aquaculture, to combat illegal, unreported, and unregulated fishing, and to address fishing overcapacity and harmful subsidies.

The United States is also pleased that the fisheries resolution more explicitly addresses the critical issue of marine debris and derelict fishing gear, which adversely affects marine living resources and habitats. We view the calls for specific action to prevent the decline of sea turtles and seabird populations by reducing bycatch as an important step forward. We applaud the language of the resolution dealing with the conservation of sharks and look forward to continuing to work with all interested States in implementing the FAO international plans of action for sharks and seabirds, as well as the recent FAO Guidelines for sea turtles.

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### *(4) Sea turtle conservation and shrimp imports*

On April 28, 2005, the U.S. Department of State certified 37 nations and Hong Kong as meeting the requirements of

§ 609 of Public Law 101-162 for continued importation of shrimp into the United States. Section 609 prohibits importation of shrimp and products of shrimp harvested in a manner that may adversely affect sea turtle species. This import prohibition does not apply in cases where the Department of State certifies annually to Congress, not later than May 1, that the government of the harvesting nation has taken certain specific measures to reduce the incidental taking of sea turtles in its shrimp trawl fisheries, or that the fishing environment of the harvesting nation does not pose a threat to sea turtle species. Such certifications are based in part on verification visits made to countries by teams of experts from the State Department and the U.S. National Marine Fisheries Service. Excerpts follow from a Department of State media note dated May 4, 2005, available at [www.state.gov/r/pa/prs/ps/2005/45611.htm](http://www.state.gov/r/pa/prs/ps/2005/45611.htm).

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The chief component of the U.S. sea turtle conservation program is a requirement that commercial shrimp boats use sea turtle excluder devices (TEDs) to prevent the accidental drowning of sea turtles in shrimp trawls. [T]hirteen nations meet[] this standard. . . .

Twenty-four nations and [Hong Kong] were certified as having fishing environments that do not pose a danger to sea turtles, [either because they] harvest shrimp using manual rather than mechanical means to retrieve nets, or use other fishing methods not harmful to sea turtles [or because they] have shrimp fisheries only in cold waters, where the risk of taking sea turtles is negligible.

Importation of shrimp from all other nations will be prohibited unless harvested by aquaculture methodology (fish-farming), in cold-water regions where sea turtles are not likely found, or by specialized fishing techniques that do not threaten sea turtles. If any of these situations apply, the shipment must be accompanied by a Department of State DS-2031 form signed by the exporter and importer and certified by a government official of the harvesting nation. Users should note that exception 7.A.(2) on the form "Harvested Using TEDs" is currently a valid exception to the prohibi-

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tion on imports from nations not certified under Public Law 101-162. However, the Department of State must determine that a country wishing to use this exception has in place an enforcement and catch segregation system for making such individual shipment certifications. Presently, only Brazil and Australia have shown that they have a system in place for specific fisheries.

### (5) *South Pacific tuna*

On May 17, 2005, President Bush signed the instrument of ratification for the Amendments to the 1987 Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, with Annexes and agreed statements, done at Port Moresby, April 2, 1987, at Koror, Palau, March 30, 1999, and at Kiritimati, Kiribati, March 24, 2002. The United States deposited the instrument on August 12, 2005.

Excerpts below from testimony by Ambassador Balton before the House Committee on Resources, Subcommittee on Fisheries Conservation, Wildlife, and Oceans, describe the amendments, which have not yet entered into force. The full text of the testimony is available at [www.state.gov/g/oes/rls/rm/2004/32245.htm](http://www.state.gov/g/oes/rls/rm/2004/32245.htm).

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This treaty, which allows U.S. vessels to fish for tuna in the waters of 16 Pacific Island States, entered into force in 1988 and was amended and extended in 1993 for a 10-year period through June 14, 2003. In March 2002, the United States and the Pacific Island Parties concluded negotiations to extend the operation of this Treaty for an additional 10-year period, through June 14, 2013, with amendments to certain provisions of the Treaty, its Annexes, and the associated Economic Assistance Agreement. The United States and the Pacific Island Parties agreed on the number of fishing licenses (45), the annual level of industry licenses fees (\$3 million USD), and the annual level of economic assistance provided by the U.S. Government under the Economic Assistance Agreement associated with the Treaty (\$18 million USD). The amendments to the



Treaty and its Annexes will, among other things, enable use of new technologies for enforcement, streamline the way any further amendments to the Annexes are agreed, and modify the waters that are open and closed under the Treaty. The Senate provided its advice and consent to the amendments to the Treaty in 2003. In addition, HR 2584 (Public Law 108-219), amended Section 6 of the South Pacific Tuna Act 1988, to take account of the Amendment to paragraph 2 of Article 3, "Access to the Treaty Area," which permits U.S. longline vessels to fish on the high seas of the Treaty Area.

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*(6) Beluga sturgeon*

On September 22, 2005, the U.S. Department of the Interior, Fish and Wildlife Service ("FWS"), announced that it would ban the import of caviar from beluga sturgeon in the Caspian Sea after caviar-exporting countries in the region failed to provide details of their plans to conserve the fish. 70 Fed. Reg. 57,316 (Sept. 30, 2005). Excerpts below from the supplementary information describe the action taken, which was effective September 30, 2005.

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On April 21, 2004, we listed beluga sturgeon as threatened (69 FR 21425) under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act). We subsequently published a special rule concerning beluga sturgeon (70 FR 10493; March 4, 2005) under section 4(d) of the Act. The special rule, located at 50 CFR 17.44(y) of our regulations, promotes the conservation of the species by allowing the import, export or re-export, and interstate and foreign commerce of beluga sturgeon caviar and meat, without threatened species permits otherwise required under 50 CFR 17.32, from littoral states in the Caspian and Black Sea basins that demonstrate progress on measures to protect and recover the species. The special rule requires countries wishing to export beluga sturgeon caviar or meat to the United States under this exemption to provide, by September 6, 2005, copies of basin-wide cooperative management

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plans for beluga sturgeon agreed to by all littoral states in the Black Sea or Caspian Sea basin along with copies of national laws and regulations implementing the management plans.

*Import of and foreign commerce in Caspian Sea beluga sturgeon suspended.* We have not received a management plan or copies of national laws and regulations from any of the littoral states in the Caspian Sea basin. Azerbaijan, the Islamic Republic of Iran, Kazakhstan, the Russian Federation, and Turkmenistan have therefore failed to meet the conditions of the special rule. As a result, beluga sturgeon caviar (including products containing caviar, such as cosmetics) and meat from these countries are no longer eligible for the exemption from threatened species permits provided by the special rule. Therefore, you may not import or re-export, sell or offer for sale in foreign commerce, or deliver, receive, carry, transport, or ship in foreign commerce in the course of a commercial activity any beluga sturgeon caviar or meat from these Caspian Sea countries on or after [September 30, 2005] without a threatened species permit. Beluga sturgeon caviar or meat originating in these countries that has been shipped on or after [September 30, 2005] without a threatened species permit issued under 50 CFR 17.32 will be refused clearance upon arrival in the United States, including shipments that have been exported directly from the countries listed above in this paragraph, re-exported through an intermediary country, or transported as personal or household effects.

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In its September 30 notice, the FWS noted that it was in the process of reviewing information received from littoral states in the Black Sea basin. Trade in beluga sturgeon caviar and meat originating in those states was suspended on October 28, 2005. 70 Fed. Reg. 62,135 (Oct. 28, 2005). The notice explained:

. . . We have not received a basin-wide management plan for beluga sturgeon from any of the littoral states in the Black Sea basin. We received information from Bulgaria, Georgia, and Serbia and Montenegro, including a copy of a document signed by Bulgaria, Romania, and Serbia and Montenegro in which they agree to implement a regional

strategy for conservation and sustainable management of sturgeon populations of the northwest Black Sea and lower Danube River. While we applaud the efforts of these countries in working toward regional cooperation, this regional agreement does not fulfill the requirements of the special rule. Under the special rule, the littoral states are required to submit a basin-wide management plan agreed to by all littoral states in the Black Sea basin (not just exporting countries). . . . As a result, beluga sturgeon caviar (including products containing caviar, such as cosmetics) and meat from these countries are no longer eligible for the exemption from threatened species permits provided by the special rule. . . .

**d. Other conservation issues**

**(1) Antarctica**

On June 13, 2005, the Antarctic Treaty Consultative Parties meeting in Stockholm, Sweden, adopted Annex VI, "Liability Arising From Environmental Emergencies," to the Protocol on Environmental Protection to the Antarctic Treaty ("the Protocol"), reprinted in 45 I.L.M. 1 (2006). Annex VI sets forth provisions relating to liability arising from the failure of operators in the Antarctic to respond to environmental emergencies relating to scientific research programs, tourism, and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty (thus excluding, e.g., fishing).

The United States is a party to the Protocol and Annexes I-V and is a consultative party to the Antarctic Treaty. The Protocol, together with Annexes I-IV, entered into force on January 14, 1998; Annex V entered into force on May 24, 2002; *see Digest 2002* at 798-800. For the Protocol and Annexes I-V, *see* S. Treaty Doc. No. 102-22 (1992); *see also* 30 I.L.M. 1455 (1991). The Antarctic Treaty entered into force on June 23, 1961.

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### (2) *Wildlife trafficking*

A Department of State media note dated September 23, 2005, announced the formation of the Coalition Against Wildlife Trafficking to counter illegal trade in wildlife and wildlife parts, as described in excerpts below. The full text of the media note is available at [www.state.gov/r/pa/prs/ps/2005/53926.htm](http://www.state.gov/r/pa/prs/ps/2005/53926.htm).

\* \* \* \*

This global coalition, initiated by the United States, will focus political and public attention on growing threats to wildlife from poaching and illegal trade. Seven major U.S.-based environmental and business groups with global interests and programs have joined the Coalition: Conservation International, Save the Tiger Fund, the Smithsonian Institution, Traffic International, WildAid, Wildlife Conservation Society, and the American Forest & Paper Association.

Wildlife trafficking—the illegal trade in wildlife and wildlife parts—is a soaring black market worth \$10 billion a year. Unchecked demand for exotic pets, rare foods, trophies and traditional medicines is driving tigers, elephants, rhinos, unusual birds and many other species to the brink of extinction, threatening global biodiversity. Added to this is the alarming rise in virulent zoonotic diseases, such as SARS and avian influenza, crossing species lines to infect humans and endanger public health.

In July 2005, at the initiative of the United States, G-8 Leaders recognized the devastating effects of illegal logging on wildlife and committed to help countries enforce laws to combat wildlife trafficking.

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### (3) *Environmental Cooperation Agreement*

On February 18, 2005, the Agreement Among the Governments of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States of America on Environmental Cooperation was signed in

Washington, D.C. The text of the agreement is available at [www.state.gov/g/oes/rls/or/42423.htm](http://www.state.gov/g/oes/rls/or/42423.htm).

Excerpts below from a media note issued by the Department of State on that date describe the agreement and the Understanding Regarding the Establishment of a Secretariat for Environmental Matters under the Dominican Republic-Central America-United States Free Trade Agreement signed on the same day. The statement also noted that “[t]he United States has recently concluded additional Free Trade Agreements with Australia, Chile, Jordan, Morocco, Bahrain and Singapore. Each of these agreements has strong environmental provisions and environmental cooperation mechanisms.”

The full text of the media note is available at [www.state.gov/r/pa/prs/ps/2005/42466.htm](http://www.state.gov/r/pa/prs/ps/2005/42466.htm).

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The Environmental Cooperation Agreement establishes a comprehensive framework for cooperation to build capacity for environmental protection with strong public involvement. It advances democratic principles and good governance related to environmental protection, including effective laws and enforcement, transparency, and access to information and justice. The Agreement establishes a high-level Environmental Cooperation Commission and identifies specific priority cooperation areas. Among other things, the agreement will strengthen sustainable development in the region through public-private partnerships and market-based approaches to achieve environmental results with greater efficiency. . . .

The Trade Understanding institutes the establishment of a Secretariat by the Organization for Central American Economic Integration to aid in the implementation of the environmental provisions of the Dominican Republic-Central America-United States Free Trade Agreement.

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(4) *Underwater cultural heritage*

On March 12, 2005, Robert C. Blumberg, Attorney-Advisor, Office of Oceans Affairs, addressed the University of Virginia Center for Oceans Law and Policy's Annual Conference on Law of the Sea Issues in the East and South China Seas in Xiamen, China, on international protection of underwater cultural heritage. Mr. Blumberg led the U.S. delegation to the UNESCO negotiations on the Convention on the Protection of Underwater Cultural Heritage, adopted in July 2001 at the 31<sup>st</sup> UNESCO General Conference.

The full text of Mr. Blumberg's remarks, excerpted below (footnotes omitted) is available at [www.state.gov/g/oes/rls/rm/51256.htm](http://www.state.gov/g/oes/rls/rm/51256.htm).

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The United States strongly supports the protection and preservation of underwater cultural heritage (UCH) for future generations, both domestically and internationally. On the domestic front, the United States has enacted numerous laws at both the state and federal levels to protect UCH.

Internationally, the United States strongly supported the Convention on the Protection of Underwater Cultural Heritage which would be developed under the auspices of UNESCO (Convention) and would, inter alia: 1) codify, for the first time, international scientific rules and standards for the management and protection of underwater cultural resources, and 2) prevent currently unregulated salvage of UCH, particularly UCH located 24 nautical miles seaward and that, in some cases, has destroyed important artifacts and archaeological and historical information. The Convention contains some important, positive provisions in this regard, in particular, the scientific Rules—the principles set forth in the Preamble and the limitation of the application of salvage law to UCH. However, certain other provisions. . . are likely to prevent many key countries from becoming parties and thereby severely limit the Convention's effectiveness. . . .

Ultimately, broad and effective protection of UCH will require further development of international law through a competent in-

ternational organization, presumably UNESCO, and by cooperative state practice.

#### Background and Context

Prior to the adoption of the UNESCO Convention there was no comprehensive legal regime that dealt specifically with the regulation of activities affecting UCH located 24 nautical miles seaward of the coast. The 1982 UN Convention on the Law of the Sea (UNCLOS) does address the protection of UCH, but its regime is complex, not entirely clear, and incomplete.

The UNCLOS Articles that deal specifically with UCH are Articles 33, 149 and 303. Other relevant Articles are those dealing with the rights and duties of states in regard to internal waters, territorial seas, the continental shelf and the exclusive economic zone (in particular, Articles 56 and 58), artificial islands and structures (Article 60), drilling (Article 81), high seas rights and freedoms (Articles 86 and 87), the basis for resolving conflicts regarding rights and jurisdiction in the exclusive economic zone (Article 59), sovereign immunity (Article 236), and the relationship to other conventions and agreements (Article 311).

Under UNCLOS, coastal States have jurisdiction to regulate activity that affects UCH in areas where they have sovereignty. This includes the territorial sea (seaward of 12 nautical miles from baselines), subject only to the property rights of flag States in regard to their identifiable sovereign immune vessels, aircraft, and other state-owned vessels that have not been abandoned. Coastal States may also prevent the removal of "objects of an archaeological and historical nature" from the contiguous zone (seaward of the territorial sea to 24 nautical miles from baselines) without their approval.

Beyond 24 miles, UNCLOS did not establish or recognize any special role or competence for coastal States in regard to the protection or regulation of UCH. UCH was treated differently from other living and non-living resources in the exclusive economic zone and continental shelf. As made clear by the International Law Commission (ILC) regarding the 1958 Convention on the Continental Shelf, UCH was not to be considered a living or non-living resource of the continental shelf over which coastal States are granted sovereign rights and jurisdiction. The UNCLOS provision (Article 56) on coastal State sovereign rights over the economic zone and conti-

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mental shelf simply repeats the wording of the 1958 Convention with respect to the rights of coastal States to explore and exploit natural resources. There is nothing in the negotiating history of UNCLOS that would alter the conclusion of the ILC with regard to any intended additional coastal State jurisdiction over shipwrecks. Indeed, the opposite is true based on both the rejection of a proposal by the Greek delegation to UNCLOS that coastal States should have jurisdiction over UCH out to 200 miles and on the ultimate adoption of Article 303.

Rather, all states have a general duty “to protect objects of an archaeological nature found at sea and shall cooperate for that purpose.” And with regard to UCH found in the “Area” (beyond the limits of national jurisdiction), UNCLOS provides that such UCH “shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” The former obligation is hortatory only. UNCLOS contains many such provisions, some of which cannot be construed to provide specific regulatory competence over UCH located in any geographic zone of a coastal State’s jurisdiction. The latter is also hortatory and, moreover, provides no clarity on what is to be considered UCH, how it is to be preserved or disposed of for the benefit of mankind, or which of the States are entitled to preferential rights or the nature of such rights.

That left UCH located beyond 24 nautical miles subject only to hortatory UNCLOS obligations and general international law (common laws of salvage law and finds). While UNCLOS limits general coastal State regulatory competence regarding UCH to the territorial sea and the contiguous zone, U.S. courts sitting in admiralty have not taken such a limited view of their jurisdiction in granting salvage rights. They have made several awards regarding the salvage of historic wrecks seaward of 24 miles, including the *Titanic*, which is located 325 miles off the Canadian coast, and the *Lusitania*, located in Ireland’s territorial sea. Moreover, there are no international scientific standards that bind admiralty courts when making salvage or finds awards regarding UCH.



Views of the United States and maritime States (most of Western Europe, Russia and Scandinavia)

This jurisdictional gap in international law under UNCLOS regarding UCH located beyond 24 miles, as well as the lack of uniform international management and protection standards, is what led the United States to support the negotiation of the UNESCO Convention. From a U.S. standpoint, the convention needed three critical features to be viable:

- 1) It had to be consistent with the jurisdictional regime set forth in UNCLOS—specifically that it not create new coastal State direct regulatory competence over UCH;
- 2) It had to provide appropriate treatment for sunken state vessels—primarily warships as defined in UNCLOS Article 236; and
- 3) It had to contain strong uniform international standards for the protection and preservation of UCH striking an appropriate balance between archaeologists that proposed no commercial activity related to UCH, and commercial salvors that wanted unfettered recovery and the continued application of salvage law and the law of finds by admiralty courts without any amendment.

With respect to jurisdiction, the United States and the maritime States opposed the original draft Convention originally co-sponsored by UNESCO and the United Nations Division of Ocean Law and Policy because, in effect, it would have established a “cultural heritage zone” beyond 24 miles and the outer edge of the continental shelf, in which coastal states would have direct authority to regulate access to UCH. . . .

This approach was opposed for both legal and practical reasons. Legally, the United States and other maritime States believed that such new direct coastal State regulatory authority over UCH would, in fact, alter the carefully constructed balance of rights and interests that was established by UNCLOS. Practically, most states—primarily because of a lack of resources and regulatory/enforcement infrastructure—had not exercised the jurisdiction they could have exercised, pursuant to UNCLOS, to regulate UCH located in their territorial seas and contiguous zones. Thus, such extended jurisdiction would be of little practical value to most states.

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Instead, the United States and the maritime States proposed that the new Convention adopt uniform international scientific management rules and standards that would be enforced through a combination of territorial, flag and port State jurisdiction. States Parties would be obligated to enforce the convention in regard to activities in their territory, vessels entering their ports, and their nationals and flag vessels wherever they operated in the world. A state would prohibit or regulate the import, export, sale, or disposal of UCH unless it was consistent with the Convention and Rules, including the manner in which UCH is initially collected and conserved (this is the approach adopted by the United States, United Kingdom, France and Canada in an agreement negotiated with respect to protecting the RMS Titanic referenced at end note 26). Under this proposal, a coastal State either unilaterally or, more effectively, through agreement with other states in a region, could also require foreign flag vessels to comply with the Convention or with more stringent national standards as a condition of port entry. Such a system would be clearly consistent with international law and would be the most effective way of protecting UCH for the practical reasons mentioned with regard to coastal State management infrastructure and monitoring capabilities. States that have the most advanced underwater recovery technology are also best capable of ensuring compliance by their nationals and flag vessels worldwide, as well as during activities in their ports and territories. Compliance with the Convention and Rules would have been further ensured by a requirement to permit observers from other interested State Parties.

Moreover, while the United States and the maritime States believed that the Convention should not provide new direct regulatory authority over UCH, their position was that the Convention could restate and clarify existing coastal State authority set forth in UNCLOS to authorize and regulate specified activities on continental shelves and in exclusive economic zones. The exercise of that authority could apply to certain activities related to the recovery of UCH. For example, much UCH lies on or is embedded in the seabed in close proximity to sensitive living resources such as coral reefs and fish spawning grounds over which coastal States have sovereign rights provided by UNCLOS. Activities to be directed at

UCH in such areas could be regulated to the extent that they would demonstrably adversely impact surrounding resources.

In addition, UNCLOS Article 60 gives coastal States the exclusive right to authorize and regulate the construction, operation, and use of installations and structures for certain specified purposes. Additionally, they are given authority over such installations and structures that may interfere with the exercise of the rights of coastal States in exclusive economic zones. The conduct of activities directed at UCH may require the use of installations or structures within the meaning of Article 60, especially in light of equipment necessary to conduct proper recording and collection of artifacts as required by the Convention's Rules. Further, UNCLOS Article 81 gives coastal States "the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." Drilling is an undefined term and the extent to which it might encompass activities directed at the recovery of UCH embedded in or located below the surface is not clear. UNCLOS experts have suggested that these articles and others related to the authority of coastal States to prevent or regulate activities that would demonstrably adversely impact resources over which states have sovereign rights were appropriate for consideration as part of the UNESCO negotiations.

The United States and other maritime States were prepared to further define, clarify and codify in the Convention existing UNCLOS authority such as related to activities directed at UCH, but this was never considered seriously by the UNESCO Secretariat and the states that favored new direct coastal State regulatory competence over UCH.

Another critical issue for the United States and many maritime States related to the treatment of warships and other state owned vessels. The view was that the Convention should codify the international law principle that title to identifiable vessels and aircraft, wherever located, that are entitled to sovereign immunity at the time of sinking, remains vested in the original flag State unless expressly abandoned, and is not lost through the passage of time. Further, no state would be permitted to salvage, recover or permit the salvage or recovery of such vessels or aircraft without the express consent of the flag State, and any recovery that is permitted would

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have to be consistent with the Convention's Rules. In accordance with existing international law reflected in UNCLOS, the coastal State would, of course, have to be involved in determining the manner of any recovery of such vessels and aircraft located in its territorial sea or contiguous zone.

Finally, the United States strongly believed that the Convention needed to contain uniform international scientific and professional standards for the protection and management of UCH similar to those in the International Council on Monuments and Sites (known as the ICOMOS Charter)—standards that are generally consistent with those in several U.S. historic preservation statutes. UNESCO had proposed that the ICOMOS Charter be adopted without amendment as part of the Convention.

Adoption of legally binding standards based on the ICOMOS Charter would necessarily mean limitations on the application of the common law of salvage and finds regarding historic wrecks. For example, salvage law presumes that shipwrecks are in “marine peril” and creates financial incentives to encourage salvors to return them and their cargoes back into the “stream of commerce.” This approach, when applied to historic shipwrecks, can conflict with the basic principles of marine archaeology reflected in the ICOMOS Charter, namely that decisions regarding the management, protection and recovery of UCH should be based, not on commercial value, but on the preservation of archaeological and contextual information. In this regard, the preferred management tool is in situ preservation. Recovery should take place only when a wreck is, in fact, in peril or recovery is otherwise determined to be in the public interest. If recovery does take place, the collection should be kept together and remain available to the public for research, education and other public purposes.

### The Convention

After several rounds of negotiations, government experts voted to submit the draft Convention as it stood in July of 2001 to the 31<sup>st</sup> UNESCO General Conference over the objection of the United States and most maritime States, and after a contentious debate it was adopted without further amendment by a divided vote of 87-4-15.

On the positive side, the Convention does establish strong legally binding international scientific rules and standards similar to the ICOMOS Charter that would govern all activities directed at underwater cultural heritage. The Rules, supported by the United States and ultimately adopted by consensus, reflect a number of hard fought compromises between the archaeological community and those with commercial interests in underwater cultural heritage, both of whom were represented on the United States delegation. The Rules would not ban all activities directed at underwater cultural heritage that have a commercial aspect as many in the archaeological community would have preferred, but they would require that such activities be conducted in accordance with current underwater archaeological standards set forth in the Rules. For example, the Rules include a strong preference in favor of in situ preservation, which would effectively ban the sale of individual artifacts, and would require that collections be kept intact and sold only if recovered, recorded and curated in accordance with the Rules. In addition, the Convention itself bans the application of the laws of salvage and finds to underwater cultural heritage, with limited exceptions.

On the other hand, while the original draft Convention changed substantially and was in many respects improved during the negotiations, the Convention as adopted contained several key provisions that are unacceptable to the United States and the maritime States that voted against adoption or abstained. In particular:

- 1) In regard to jurisdiction, primarily at the insistence of the Group of 77, the Convention created new direct or indirect coastal State rights and general regulatory competence over UCH located in the exclusive economic zone and on the continental shelf.
- 2) The Convention does not adequately protect sunken warships and aircraft and other state vessels and would alter the previously described international law and the practice of many maritime States regarding title to such vessels. Moreover, it would permit coastal State recovery of such vessels located in internal waters and the territorial sea without the consent of flag States or even an obligation to notify them. It also places objectionable new restrictions on existing rights of flag States

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and creates new coastal State rights regarding such vessels located seaward of 24 miles in the exclusive economic zone and on the continental shelf.

The Convention contains other problematic provisions that could have been considered for ratification as part of an otherwise broadly acceptable package. But these provisions are overshadowed by jurisdictional and warship provisions.

As the Convention's jurisdictional reach and obligations fully extend to a state's territorial sea, contiguous zone, 200 mile economic zone and continental shelf, as well as to controlling the activities of its nationals and flag vessels worldwide, it is likely to be some time before many countries will be capable of implementing it in full. Indeed, as previously noted, most countries have not been willing or able to exert jurisdiction over UCH within the 24 miles they already have under UNCLOS. . . .

The Convention will enter into force after 20 countries have indicated their consent to be bound by depositing instruments of accession, adherence, acceptance or ratification. Thus far, only three—Panama, Bulgaria, and recently Croatia—have done so. . . . Ultimately, the Convention will not be effective unless it is broadly ratified and implemented throughout the international community, including by countries in which the most advanced undersea technology resides and whose nationals are most active in regard to underwater cultural heritage. In that respect, it is important to note that several countries with such technology including France, Germany, the Netherlands, Norway, Russia, Sweden and the United Kingdom either voted against adoption or abstained from voting. The United States was not a member of UNESCO at the time, and therefore had no vote in the proceedings. However, the U.S. delegation made a clear statement opposing adoption. The main points of objection were on jurisdictional framework and treatment of warships and State vessels.

If these and other key countries remain outside the UNESCO regime because of the expansive jurisdictional and warship provisions, the Rules and other positive provisions of the Convention are likely to have a substantially limited impact on the protection of underwater cultural heritage.

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### 3. Shared Natural Resources

On November 18, 2005, Carolyn Willson, Minister Counselor for Legal Affairs, U.S. Mission to the United Nations, addressed the Sixth Committee on Agenda Item 80, Report of the International Law Commission on the Work of its 57th Session—Shared Natural Resources.

The full text of Ms. Willson's statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The Report of the International Law Commission is available at [www.un.org/law/cod/sixth/60/sixth60.htm](http://www.un.org/law/cod/sixth/60/sixth60.htm). The Report of the Sixth Committee is found in U.N. Doc. A/C.6/60/SR.12, which includes the substance of the U.S. statement at 2, available at <http://documents.un.org>.

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The topic of Shared Natural Resources is undoubtedly a complex one, as there is still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice vary widely. As a result, the United States believes that context-specific arrangements are the best way to address pressures on transboundary groundwaters. Rather than producing another Convention, a more useful way forward would be for the Commission to develop a list of considerations or guidelines that States might take into account in negotiating more specific and meaningful bilateral or regional arrangements.

At a minimum, however, it is important to be clear that the Commission's work on this topic does not represent a codification exercise, since the content of the proposed draft articles goes well beyond the established law. Declaratory articles, for example, would not be appropriate.

Finally, the United States notes that the Commission had decided, in considering the topic "Shared Natural Resources," to address the issue of aquifers, a daunting task on its own. We support the Commission's work on this important subject, and at the same time urge it to avoid taking on more controversial sub-topics, such as oil and gas, which could, in our view, detract value from the exercise overall.

## B. MEDICAL AND HEALTH

### 1. International Health Regulations

On May 23, 2005, the 58th World Health Assembly adopted revised International Health Regulations. WHA58.3, Agenda item 13.1. As provided in Article 2 of the new regulations, “the purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

Under Article 22 of the World Health Organization Constitution, regulations adopted by the Health Assembly “shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.” In keeping with Article 22, on June 15, 2005, the Director-General of the WHO notified all members of the adoption of the regulations and provided an eighteen-month period (until December 15, 2006) for member states to “reject or to make reservations to the Regulations, as provided in Articles 61 and 62 thereof.”

On May 23, the United States provided a statement for the record welcoming adoption of the regulations and stating its intention to submit two understandings and one reservation to the revised regulations, as set forth in full below. WHO Doc. A58/4. The WHO Constitution and WHA resolution 58.3, containing the text of the revised regulations, are available at [www.who.int/governance/en/](http://www.who.int/governance/en/).

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The United States agrees with other Member States that the current International Health Regulations (IHRs) are insufficient in view of today’s rapid, high-volume international migration, emerging infections, and threats of terrorism. Accordingly, the United States has participated actively in the Intergovernmental Working Group (IGWG) and in sub-regional and regional meetings. The United



States believes that the revised IHRs will provide an effective mechanism to respond to new global public health threats in a manner that is consistent with the principles embodied in Article 3. We attach particular importance to the universal application of the IHRs for the protection of all people of the world from the international spread of disease. The United States is pleased with the work of the IGWG and the cooperation and flexibility of negotiating partners and fully supports the adoption of the text of the revised IHRs that was approved by the Working Group on May 14.

The United States, however, has several concerns regarding the final text of the revised IHRs. Therefore, the United States makes this statement regarding the concerns set forth below and, at the appropriate time, will submit formal understandings and a reservation in relation to these concerns.

#### INTENTIONAL RELEASE/CHEMICAL, BIOLOGICAL, AND RADIOLOGICAL MATERIALS

Throughout the revision process of the IHRs, the United States has taken the position that the new IHRs must reflect the real threats to international public health in the 21st century. Among the most serious of those threats is the accidental or deliberate release of biological, chemical and radiological materials. One of the reasons proposed by the WHO for revising the IHRs was to address these new threats to public health.

The United States is pleased that all States Parties to the revised IHRs will be obligated to notify events that involve the accidental or deliberate release of biological, chemical and radiological materials that may have the potential to cause Public Health Emergencies of International Concern and that the WHO Director-General may declare Public Health Emergencies of International Concern regardless of the source or origin of the event. We note that Article 7 of the revised IHRs specifically requires a State Party to provide to WHO any evidence it has of an “unexpected or unusual public health event within its territory irrespective of origin or source, which may constitute a Public Health Emergency of International Concern.” The deliberate or accidental release of biological, chemical and radiological materials within the territory of a State Party would certainly constitute an “unexpected or unusual event . . . irrespective of origin or source.” Moreover, the World Health As-

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sembly has explicitly acknowledged a role for WHO in this area, most notably in World Health Assembly Resolution 55.16 (“Global public health response to natural occurrence, accidental release or deliberate use of biological and chemical agents or radionuclear material that affect health”), which was adopted by consensus in 2002. Thus the United States will apply the revised IHRs with the understanding that the regulations apply to all such health threats—chemical, biological, and radiological—and all causes and modes of events—regardless of whether they are naturally occurring, accidental, or deliberate—and we expect all other Member States of the WHO to do the same. The United States expects to submit a formal understanding to that effect at the appropriate time.

### NATIONAL SECURITY

The United States sought a provision within the IHRs that would have explicitly allowed States Parties, in rare cases, to take into account national security requirements as they apply the IHRs to their Armed Forces. Although the IGWG did not adopt this explicit provision, the United States understands that the IHRs—a public health instrument—are not intended to compromise the national security of States Parties. Therefore we will implement these IHRs as they apply to armed forces with that understanding. The United States expects to submit a formal understanding to that effect at the appropriate time.

### FEDERALISM

For the record, the United States sought a provision that would explicitly recognize the right of federal states to implement the IHRs in a manner that is consistent with the division of rights and responsibilities existing in their constitutionally mandated systems of government. Unfortunately, the IGWG did not accept this straightforward request.

Accordingly, the United States will submit a narrowly tailored reservation in accordance with Article 62 of the IHRs that will clarify that the United States will implement the IHRs in a manner consistent with our federal system of government.

The United States also states for the record of this meeting that with respect to the United States, the Federal government will imple-

ment the IHRs to the extent it exercises jurisdiction over the matters covered therein. Otherwise, our state and local governments will implement them. To the extent that state and local governments in the United States exercise jurisdiction over such matters, the Federal Government will take measures appropriate to our Federal system to facilitate the implementation of these Regulations.

## 2. Human Cloning

On March 8, 2005, the UN General Assembly adopted by vote Resolution A/RES/59/280, "United Nations Declaration on Human Cloning." The United States voted for and welcomed the adoption of the declaration, which, among other things declares that member states "are called upon to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life." See [www.un.int/usa/05\\_042.htm](http://www.un.int/usa/05_042.htm). An explanation of the U.S. vote in favor of the resolution when it was considered by the Sixth Committee, provided by Carolyn Willson, UN Minister Counselor for Legal Affairs, on February 18, 2005, is excerpted below. The full text of Ms. Willson's statement is available at [www.un.int/usa/05\\_025.htm](http://www.un.int/usa/05_025.htm).

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The United States has supported this extremely significant document. The international community has confirmed its abhorrence of human cloning and declared its commitment to protecting the sanctity of human life and promoting respect for human dignity. It has issued a call to all Member States to prohibit all forms of human cloning and asked them to implement this call by enacting national legislation without delay.

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The United States welcomes this step and the call for further steps in the form of legislative action at the national level. In our view, this is the most effective and expeditious route to dealing with the potential threat of human cloning. We have been encouraged, as more and more Member States have supported a ban on all

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forms of human cloning. Now the United Nations has issued a strong and clear call for action to put such a ban into effect.

Medical research must proceed, but it must proceed in an ethical manner so that women are not exploited, the needs of developing nations for treatment of tuberculosis, malaria and HIV/Aids are not neglected and no human life is ever produced to be destroyed for the benefit of another.

### 3. Avian Influenza

In addressing the United Nations High-Level Plenary Meeting on September 14, 2005, President Bush announced “a new International Partnership on Avian and Pandemic Influenza.” The President stated:

As we strengthen our commitments to fighting malaria and AIDS, we must also remain on the offensive against new threats to public health such as the Avian Influenza. If left unchallenged, this virus could become the first pandemic of the 21st century. . . . The Partnership requires countries that face an outbreak to immediately share information and provide samples to the World Health Organization. By requiring transparency, we can respond more rapidly to dangerous outbreaks and stop them on time. Many nations have already joined this partnership; we invite all nations to participate. . . .

In a letter to Secretary-General Kofi Annan dated October 31, 2005, Ambassador John R. Bolton, Permanent Representative of the United States to the United Nations, transmitted “the core principles adopted by the International Partnership on Avian and Pandemic Influenza at a meeting held on 6 and 7 October 2005, noting the global cooperation needed to address health emergencies.” U.N. Doc. A/60/530 (2005) available at <http://documents.un.org>. Participating countries and international organizations committed to principles “to establish a more coordinated and effective basis for limiting the social, economic and health impacts of avian and pandemic influenza, consistent with national legal authorities and rele-

vant international law and frameworks.” A list of those entities is contained in an annex to the letter.

On November 19, 2005, the White House Office of the Press Secretary issued a fact sheet announcing that APEC Leaders had “endorsed the U.S. co-sponsored initiative on ‘Preparing for and Mitigating an Influenza Pandemic’ to ensure that economies of the region—working individually and collectively—can better prepare for, prevent, and respond to a potential influenza pandemic.” The fact sheet is available at [www.state.gov/g/oes/rls/fs/57225.htm](http://www.state.gov/g/oes/rls/fs/57225.htm).

## **C. OTHER TRANSNATIONAL SCIENTIFIC ISSUES**

### **Science and Technology Agreements**

A fact sheet dated August 9, 2005, provided a list of current umbrella science and technology agreements to which the United States is a party, available at [www.state.gov/oes/rls/fs/50911.htm](http://www.state.gov/oes/rls/fs/50911.htm). A brief description of the agreements included in the fact sheet is set forth below. In addition, on October 17, 2005, the United States signed a science and technology agreement with India. *See* remarks of Secretary Rice and Minister of Science and Technology Kapil Sibal at [www.state.gov/secretary/rm/2005/55207.htm](http://www.state.gov/secretary/rm/2005/55207.htm).

The Department of State’s Bureau of Oceans, and International Environmental and Scientific Affairs, Office of Science and Technology Cooperation (OES/STC) works to establish binding bilateral and multilateral umbrella Science and Technology (S&T) Agreements. Currently, there are 30 umbrella S&T Agreements worldwide that establish frameworks to facilitate the exchange of scientific results, provide for protection and allocation of intellectual property rights and benefit sharing, facilitate access for researchers, address taxation issues, and respond to the complex set of issues associated with economic development, domestic security and regional stability. S&T cooperation supports the establishment of science-based industries, encourages investment in national science infrastructure, education and the application of scientific stan-

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dards, promotes international trade and dialogue on issues of direct import to global security, such as protection of the environment and management of natural resources. S&T collaboration assists USG agencies to establish partnerships with counterpart institutions abroad. These relationships enable them to fulfill their individual responsibilities by providing all parties with access to new resources, materials, information, and research. High priority areas include such areas as agricultural and industrial biotechnology research (including research on microorganisms, plant and animal genetic materials, both aquatic and terrestrial), health sciences, marine research, natural products chemistry, environment and energy research.

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### Cross References

*Role of UN Environment Program*, Chapter 7.A.2.

*Amendment to TRIPS enhancing access to medicines*, Chapter 11.D.2.

*Anti-doping Convention*, Chapter 14.D.1.

## CHAPTER 14

### Educational and Cultural Issues

#### A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

Effective October 20, 2005, the Bureau of Customs and Border Protection, Department of Homeland Security, and the Department of the Treasury extended import restrictions imposed with respect to Pre-Columbian material from archaeological sites throughout Nicaragua. 70 Fed. Reg. 61,031 70 Fed. Reg. 61,031 (Oct. 20, 2005). Background information provided in the Federal Register is excerpted below. Further information and links to related documents are available at <http://exchanges.state.gov/culprop/hnfact.html>.

Pursuant to the provisions of the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention [on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property], codified into U.S. law as the Convention on Cultural Property Implementation Act (Pub. L. 97-446, 19 U.S.C. 2601 et seq.), the United States entered into a bilateral agreement with the Republic of Nicaragua on October 20, 2000, concerning the imposition of import restrictions on certain categories of archeological material from the Pre-Hispanic cultures of the Republic of Nicaragua. On October 26, 2000, Customs and Border Protection (CBP) published T.D. 00-75 in the Federal Register (65 FR 64140), which amended 19 CFR 12.104g(a) to reflect the imposition of these restrictions and included a list designating the types of articles covered by them.

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Import restrictions listed in 19 CFR 12.104g(a) are “effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period can be extended for additional periods not to exceed five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists” (19 CFR 12.104g(a)).

After reviewing the findings and recommendations of the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, concluding that the cultural heritage of Nicaragua continues to be in jeopardy from pillage of Pre-Hispanic archaeological resources, made the necessary determination to extend the import restrictions for an additional five years on September 1, 2005.

### B. IMMUNITY FROM JUDICIAL SEIZURE OF ART AND OTHER CULTURAL OBJECTS

On March 30, 2005, the District Court for the District of Columbia denied a motion to dismiss for lack of jurisdiction a claim brought against the City of Amsterdam alleging expropriation of works of art created by Kazimir Malewicz then on exhibit in the United States. *Malewicz v. Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005). Prior to the importation of the art works under the Mutual Educational Cultural Exchange Program, the Department of State had determined that they were “of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest.” This determination provided immunity from seizure and other forms of judicial process while in this country under 22 U.S.C. § 2459. For a discussion of the U.S. Statement of Interest filed December 22, 2004, see *Digest 2004* at 792-96.

In a Supplemental Statement of Interest filed March 17, 2005, the United States reconfirmed its view that the presence of the immune art works could not provide the basis for an exception under the Foreign Sovereign Immunities Act, stating:

it is the considered view of the Executive branch that if jurisdiction over a sovereign lender could be established



solely by virtue of introduction into the United States of an exhibit immunized under section 2459, foreign states would be far less likely to agree to share their artwork with the American public, undermining the principal objective of section 2459. This view should be accorded deference by the Court “as the considered judgment of the Executive on a particular question of foreign policy.” *See [Republic of Austria v.] Altmann*, 124 S. Ct. at 2255; *see also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004). (fn. omitted)

The district court agreed that § 2459 “deprives all U.S. courts from taking any action to obtain physical custody of the Malewicz Collection or other cultural icons granted immunity while in this country.” Nevertheless, the court concluded that the status of the art works alone did not deprive the court of jurisdiction under § 1605(a)(3) of the Foreign Sovereign Immunities Act. Section 1605(a)(3) provides an exception to foreign sovereign immunity to which the city of Amsterdam would otherwise be entitled, in cases of alleged expropriation

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is *present in the United States in connection with a commercial activity* carried on in the United States by the foreign state. . . .

(emphasis added). Although denying the motion to dismiss, the court concluded that the record was insufficient to determine whether Amsterdam’s contacts or activities satisfied the definition of “commercial activity” set forth in FSIA § 1603 as “commercial activity carried on by such state and having substantial contact with the United States,” and whether the requirement for exhaustion of remedies barred plaintiffs’ claim. These issues were pending at the end of 2005.

## C. CULTURAL DIVERSITY

### 1. Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UN Educational, Scientific, and Cultural Organization (“UNESCO”) held its General Conference in Paris from October 3-21, 2005. On October 20, 2005, the General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. On that date, the U.S. Mission to UNESCO in Paris issued a statement, set forth below in full, explaining the U.S. vote against adoption of the convention. *See also* October 21, 2005, on-the-record roundtable with Ambassador Louise V. Oliver and foreign journalists, available at [www.state.gov/p/io/rls/rm/56586.htm](http://www.state.gov/p/io/rls/rm/56586.htm). The text of the convention is available in the Records of the General Conference: Resolutions at 83, [unesdoc.unesco.org/images/0014/001428/142825e.pdf](http://unesdoc.unesco.org/images/0014/001428/142825e.pdf).

U.S. Ambassador to UNESCO Louise V. Oliver told the UNESCO General Conference Plenary today that the United States could not support the Convention on the Protection and Promotion of the Diversity of Cultural Expressions because it did not promote cultural diversity and could be misused by governments to deny their citizens’ human rights and fundamental freedoms and inhibit international trade. Oliver pointed out that “The United States is the most open country in the world to the diversity of the world’s cultures, people, and products. It is not only a part of our heritage but the essence of our national identity.”

“This convention as now drafted,” Oliver stated, “could be used by states to justify policies that could be used or abused to control the cultural lives of their citizens—policies that a state might use to control what its citizens can see; what they can read; what they can listen to; and what they can do. We believe—in keeping with existing conventions—that the world must affirm the right of all people to make these decisions for themselves.”

Oliver called the process leading up to the adoption of the convention an overly hasty one that did not permit negotiations that

would have led to true consensus. She called the resulting document deeply flawed, ambiguous, and inconsistent.

Oliver emphasized: “We have been clear that the Convention cannot properly and must not be read to prevail over or modify rights and obligations under other international agreements, including WTO Agreements. Potential ambiguities in the Convention must not be allowed to endanger what the global community has achieved, over many years, in the areas of free trade, the free flow of information, and freedom of choice in cultural expression and enjoyment. We have been assured by a number of other delegations that the Convention is not intended to modify or prevail over the rights and obligations of Parties arising under other international agreements. We sincerely hope and expect to observe over time that the actions of governments that ratify the Convention will be consistent with these assurances, and not in line with the troubling public statements of officials of some governments.”

A fact sheet released by the Department of State on October 11, 2005, commented further on U.S. concerns with the convention on trade and human rights issues. The full text of the fact sheet, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/54690.htm](http://www.state.gov/r/pa/prs/ps/2005/54690.htm).

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### **Respect for Free Trade**

The United States is concerned that Member States could misinterpret the Convention as a basis for impermissible new barriers to trade in goods, services, or agricultural products that might be viewed as being related to “cultural expressions.” The possibility that the current draft of the Convention could be misinterpreted in this way is due to:

- vague definitions as to the scope of the Convention;
- potentially sweeping provisions as to measures that parties may take to defend ill-defined cultural objectives; and,
- an ambiguous provision on the relationship between the Convention and other international agreements, including those related to trade.

*The Convention should be redrafted so that it cannot be misinterpreted to authorize governments to impose protectionist trade measures in the guise of protecting culture.*

#### Respect for Human Rights and the Free Flow of Information

The draft is ambiguous and contradictory in its treatment of the flow of cultural information and goods. Some paragraphs emphasize freedom of expression, information, and communication, while other paragraphs imply that there are acceptable governmental controls on such freedoms. For example, Article 8 of the draft authorizes states party to the Convention to take “all appropriate measures” to protect and preserve cultural expressions under serious threat. The U.S. believes that such an action-oriented provision needs to be carefully circumscribed to ensure that it could not be misinterpreted to justify measures that would interfere with human rights and fundamental freedoms. *At a minimum, the Convention should be redrafted so that it cannot be misinterpreted to authorize measures limiting freedom of expression or restricting the flow of information.*

\* \* \* \*

## 2. UN Resolutions

On December 16, 2005, the United States joined consensus on UN General Assembly Resolution 167, “Human Rights and Cultural Diversity,” U.N. Doc. A/RES/60/167. Operative paragraph 3 of the resolution as amended provides that the General Assembly “[r]ecognizes the right of everyone to take part in cultural life and to enjoy on mutually agreed terms the benefits of scientific progress and its applications.”

The U.S. representative stated:

The United States is pleased to join consensus on this resolution. In doing so, we note that we interpret [operative paragraph] OP3, as we have in the past, to incorporate the principle of “on mutually agreed terms” because such a “right to enjoy the benefits of scientific progress and its applications” can only be achieved in conjunction with the right of everyone to the protection of the moral and

material interests resulting from any scientific, literary or artistic production of which he or she is the author, as reflected in Article 27.2 of the Universal Declaration of Human Rights.

On April 14, 2005, the United States proposed to amend a draft UN Commission on Human Rights resolution concerning promotion of the enjoyment of cultural rights for everyone and respect for different cultural identities, by deleting paragraphs 18-21 of the resolution concerning the appointment of an independent expert “who could elaborate concrete proposals and recommendations on the implementation” because insufficient information had been provided on the estimated cost of the proposal. The amendment was rejected. The United States then called for a vote and voted no; see U.S. statement at [www.humanrights-usa.net/2005/0414Item10L22.htm](http://www.humanrights-usa.net/2005/0414Item10L22.htm). The text of Resolution 2005/20 as adopted is reprinted in the Commission on Human Rights, Report on the Sixty-First Session, E/CN.4/2005/135 at 79, available at [www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf](http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf).

## **D. OTHER UNESCO INSTRUMENTS**

### **1. Anti-Doping Convention**

The United States joined consensus on the adoption of the International Convention against Doping in Sport at a plenary meeting of UNESCO, October 19, 2005. The convention generally promotes the prevention of and the fight against doping in sport, with a particular emphasis on the education of amateur athletes. The United States was an active participant in the negotiations and generally viewed the convention as evolving out of the World Anti-Doping Code (the “Code”) and complementing the work of the World Anti-Doping Agency (“WADA”), which was established in 1999 to combat the use of performance enhancing illicit drugs in sports, including the Olympics. The relationship between the convention and the Code is explained in Article 4 of the convention, and

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WADA is given a formal role in implementing the convention in Article 32. The text of the convention is available in the Records of the General Conference: Resolutions at 29, <http://unesdoc.unesco.org/images/0014/001428/142825e.pdf>.

WADA is jointly governed and funded by the Olympic Movement and national governments. The United States has been a leader in WADA's governance and a strong proponent of the organization since its creation. Pursuant to Executive Order 13165 (August 9, 2000), as amended, the Director of the Office of National Drug Control Policy serves as the representative of the United States to WADA's governing board. A major accomplishment for WADA was the adoption in March 2003 of the Code, which seeks to promote the harmonization across sports and nations of anti-doping rules and regulations dealing with such issues as prohibited substances, testing regimes, and sanctions. The text of the Code can be found at [www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf). In addition, the Code encouraged governments to evidence their commitment to the fight against doping by engaging in "a process leading to a convention or other obligation to be implemented as appropriate to the constitutional and administrative contexts of each government. . . ."

The first draft of the convention, compiled by an experts group assembled by UNESCO, was based largely on the Council of Europe Anti-Doping Convention, which takes an approach to anti-doping policies and practices that is not consistent with the U.S. approach. The Council of Europe convention promotes the direct regulation of sports, with an extensive monitoring system, while the approach by the United States and certain other countries has been to indirectly regulate sports by supporting sports institutions within the United States to self-regulate. In the U.S. view, WADA already effectively works to monitor activities of states in relation to anti-doping and a new monitoring mechanism under the auspices of UNESCO would ultimately duplicate WADA's efforts. Instead, the position of the United States is that the convention should be a new tool that would work in con-

cert with WADA to enhance the effectiveness of the overall framework against doping in sport.

At the final conference at which the convention was adopted in October 2005, the only remaining issue was whether the Secretariat for the convention, and any costs associated with monitoring the convention, should be funded out of UNESCO's general budget or, as supported by the United States and a number of other countries, through a voluntary fund established by the convention. In the end, a compromise was forged. Article 32 of the convention states that "Functioning costs related to the Convention will be funded from the regular budget of UNESCO within existing resources at an appropriate level, the Voluntary Fund established under Article 17 or an appropriate combination thereof as determined every two years. The financing for the secretariat from the regular budget shall be done on a strictly minimal basis, it being understood that voluntary funding should also be provided to support the Convention." Article 30(1)(e) states in relevant part that "[a]ny monitoring mechanism or measure that goes beyond Article 31 shall be funded through the Voluntary Fund established under Article 17."

A final statement by Deputy Assistant Legal Adviser for Treaty Affairs Avril Haines, supporting the adoption of the draft convention and clarifying the United States' understanding of the relevant provisions relating to the compromise regarding the funding of the convention, is excerpted below. The full text of Ms. Haines' statement is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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You are all, by now, familiar with our policy that States Parties should pay for the administrative costs incurred by the operation of a Convention to which they are a party and that these costs should not be borne by the general budget of the organization. However, without prejudice to that position, we think the consensus text put forward today is a suitable compromise.

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As we understand it and as others, including the Secretariat, have reflected in their interventions, any monitoring mechanisms or measures developed by the Conference of Parties under Article 30(1)(e) shall be funded through the voluntary fund. Article 32 deals with the “Functioning Costs of the Convention.” We understand this phrase to refer to the costs associated with the Secretariat, the Conference of Parties and the reporting mechanism referred to in Article 31. Article 32 makes clear that these costs can be funded by an appropriate combination of the general budget and the Voluntary fund, but makes it clear that funding for the secretariat from the regular budget shall be done on a strictly minimal basis.

With these understandings, we can wholeheartedly support the adoption of this Convention.

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### 2. Declaration on Bioethics and Human Rights

The United States joined consensus in adoption of a Universal Declaration on Bioethics and Human Rights on October 19, 2005, at a UNESCO plenary meeting. *See* [www.state.gov/p/io/rls/rm/56586.htm](http://www.state.gov/p/io/rls/rm/56586.htm). The text of the declaration is available in the Records of the General Conference: Resolutions at 74, <http://unesdoc.unesco.org/images/0014/001428/142825e.pdf>. The U.S. statement on joining consensus is set forth below and is available, *id.* at 209.

The United States is pleased to be able to join consensus on the Universal Declaration on Bioethics and Human Rights. Although far from perfect, this document helps to provide a basic framework of ethical principles to guide States in the development of their domestic legislation and policies.

The United States believes it is particularly important that this Declaration is aimed at ensuring fundamental freedoms and respect for the life of human beings. The United States fully endorses the Declaration’s recognition that respect for human dignity and human rights requires respect for the life of human beings. The United



States, moreover, applauds the primacy accorded to human dignity, which is the basis for human rights.

As stated in the Preamble, this Declaration is to be understood in a manner consistent with domestic and international law. The United States has long been a leader in applying bioethical principles to biomedical research and the delivery of health care. In our legislation, rules, court decisions, and administrative actions and policies, we have grappled with the many difficult issues that inevitably arise in implementation of the principles of the Declaration. We have joined the Declaration, therefore, on the basis of the understanding that the Declaration is to be understood in a manner consistent with our domestic law. Alongside the ethical principles it states, the Declaration articulates the hope that progress in science and technology will advance the health and well being of the people of the world. These goals can be achieved only if innovators are assured that they will be rewarded for their genius, their efforts and the resources they devote to it. The United States emphasizes, in accepting this Declaration, the critical role that intellectual property, and the protection of it, play in fostering medical, scientific, and technological research and development, and in making the fruit of human creativity widely available. As recognized in the Universal Declaration on Human Rights, the right to own property is a basic right, on which so many others depend, and everyone has the right to the protection of the moral and material interests resulting from their scientific, literary or artistic production. Everyone benefits by the recognition and protection of those rights.

#### **Cross Reference**

*Underwater Cultural Heritage, Chapter 13.A.2.d.(4).*



## CHAPTER 15

### Private International Law

#### A. COMMERCIAL LAW

##### 1. Choice of Court Convention

On June 30, 2005, the sixty-five member states of the Hague Conference on Private International Law met in The Hague to sign the Final Act of the Twentieth Session of the Hague Conference on Private International Law, available at [www.hcch.net/upload/finalact20e.pdf](http://www.hcch.net/upload/finalact20e.pdf). Among other things, the Final Act reflects the decision to submit to governments the Hague Choice of Court Convention.\* The text of the convention is included in the Final Act and is also available at [www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98). The text marks the culmination of thirteen years of effort, initiated by the United States, to achieve what was initially envisioned as a broader convention on the recognition and enforcement of foreign civil judgments. *See* letter from the Legal Adviser of the Department of State dated May 5, 1992, and subsequent developments, *Cumulative Digest 1991-1999* at 1826-33. A preliminary draft was prepared by a Special Commission in October 1999; *see* Preliminary Draft Convention On Jurisdiction And Foreign Judgments In Civil And Commercial Matters adopted by the Special Commission and Report by Peter

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\* The Final Act also included amendments to the Hague Statute, discussed in Chapter 4.A.3.b.

Nygh and Fausto Pocar, available at [www.hcch.net/upload/wop/jdgm11.pdf](http://www.hcch.net/upload/wop/jdgm11.pdf). An Interim Text produced in 2001 reflected disagreement among the parties on many aspects; see Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, available at [www.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf).

By 2003 the original, broad-scale project had been set aside due to lack of consensus on a number of difficult issues, and an effort emerged to negotiate a narrower convention, “one focused on the enforcement of choice of forum agreements in commercial contracts and the enforcement of resulting judgments.” See *Digest 2003* at 840-42.

As explained in a 2003 letter from Jeffrey Kovar, then Assistant Legal Adviser for Private International Law, “[s]tate law and practice in the U.S. is the most open in the world to the enforcement of foreign judgments. We believe that if other countries were to provide the same level of comity to U.S. and other foreign judgments there would be a substantial benefit to international trade and commerce.” *Id.* The choice of court convention would be the first bilateral or multilateral agreement imposing legal obligations related to enforcement of judgments to which the United States is a party.

At the time of the 2005 Final Act, the U.S. delegation noted:

- Under the Convention, choice of court agreements between commercial parties will be respected and the resulting judgments will be enforced—just as U.S. courts have been doing for foreign parties for decades.
- The Convention represents an historic opportunity for American business. The expectation is that this Convention will parallel the widely ratified New York Convention [UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS No. 6997 (1958)], which provides for the recognition and enforcement of foreign arbitral awards, by providing a similar structure for the recognition and enforcement of foreign judgments rendered in accordance with choice of court agreements.

Comments from the United States on the December 2004 Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements, dated June 10, 2005, urged that the final report be significantly restructured from the draft, as excerpted below. The U.S. commentary is available in Comments on the Preliminary Draft Convention on Exclusive Choice of Court Agreements, Prel. Doc. No 29 (Addendum 1), June 2005, at [www.hcch.net/upload/wop/jdgm\\_pd29\\_add.pdf](http://www.hcch.net/upload/wop/jdgm_pd29_add.pdf). At the end of 2005 the final report had not yet been released.

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The Report might begin with an overview that highlights that the three basic rules of the Convention are found in Articles 5, 7, and 9. By simply beginning with Article 1, the Report could create the impression that a front-to-back read can help one best understand the Convention. Our experience is that this kind of reading can create problems, as it does for people who come to the Brussels Convention and Regulations for the first time and try to read it in consecutive order. The Report should begin with an introduction to the core rules:

- 1) The chosen court has exclusive jurisdiction and must exercise it (Article 5).
- 2) A court not chosen must (with limited exceptions) defer to the chosen court (Article 7 [Article 6 in the final text]).
- 3) Contracting States will recognize and enforce judgments resulting from choice of court jurisdiction (Article 9 [Article 8 in the final text]).

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## **2. Extraterritoriality and Conflicts of Jurisdiction**

On June 23, 2005, Department of State Legal Adviser John B. Bellinger, III, participated in a conference of the Union des Industries de la Communauté européenne in Brussels. Mr. Bellinger addressed aspects of the exercise of extraterritorial jurisdiction by domestic courts, primarily as practiced by the

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United States. The full text of Mr. Bellinger's remarks, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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It's no secret that the United States is a relatively litigious society, and that we have long had a tendency to debate and resolve issues of public policy in our courts. In fact, de Tocqueville noted long ago that "There is hardly a political question in the United States that does not sooner or later turn into a judicial one."

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### Extraterritoriality and Conflicts of Jurisdiction Generally

We . . . are very much aware of, and sensitive to, the concerns which have been expressed by foreign businesses and governments about what is sometimes perceived to be the unreasonable exercise of jurisdiction by U.S. courts over people, entities and activities in other countries. Even if we come from different legal traditions—and here I am of course referring to the civil law tradition here on the Continent and the common law tradition in the United States and the United Kingdom—I think we can all agree that when you live, work or do business in a particular country, even if only temporarily, you must abide by the relevant legal rules of that country. Of course, globalization, the increasingly transnational nature of business and commerce, and the new digitally inter-connected information environment all ensure that activities are more and more likely to have impacts across national boundaries. And that's where the legal difficulties begin. These new realities strain the ability of the law to protect our citizens, regulate our economies, and respond effectively to international crime, including terrorism. Internationally, there is naturally a rise in the number of conflicts of jurisdiction and controversies about jurisdiction. Business—which craves predictability—can be adversely affected. Now, in the U.S. legal system, our law recognizes two separate concepts of jurisdiction, both relevant to the issue of extraterritoriality. One has to do with jurisdiction over the person, the other with jurisdiction over the subject matter of the issue before the court. As you know, our ideas of subject matter jurisdiction sometimes extend to activities

which take place overseas but which have an actual or even intended impact or effect on our markets or interests. While jurisdiction over the person depends in most cases on the actual presence of the individual—even his or her temporary or transient presence in the United States—in some instances it can extend to “constructive” presence, for example through business or other activities.

Extraterritoriality is by no means unique to U.S. law—many Continental systems, and the EU itself, have adopted extraterritoriality. And our notions of extraterritoriality are by no means unlimited. Constitutional concepts of due process and our appreciation of reasonableness and comity under international law and practice are frequently invoked by courts as limiting factors on the exercise of extraterritoriality. Finally, unlike many civil law systems, U.S. law tends to disfavor jurisdiction based solely on nationality, so that it often does not extend to the activities of U.S. citizens and companies overseas.

On both sides of the Atlantic, though, we share a common desire for cooperation between our different systems so that commercial parties can expect the efficient and effective resolution of disputes in the most logical and appropriate forum. We know that business parties value their ability to choose the forum in which disputes may be resolved, whether that is through arbitration or through litigation in a specified domestic court. We know that they prize certainty and predictability in the process. This, in fact, is why our lawyers and experts are working as we speak in The Hague to achieve a global convention on the enforcement of choice of court agreements and related civil judgments. We hope that you will support these negotiations and other efforts to enhance international judicial cooperation and the development and harmonization of private law. Through creative approaches, we can reduce pressures to exercise overlapping and even conflicting jurisdiction over the same events.

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### Suits Against Foreign Government Officials

I would like to move now to the specific subject of suits involving visiting foreign officials, which is an example of how international forum shopping can directly affect the conduct of diplomacy.

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Under the Alien Tort Statute\*, suits are sometimes brought against foreign government officials traveling in the United States. In such cases, plaintiffs may name the foreign officials as individual defendants precisely because, under our rules of foreign sovereign immunity, they are unable to sue the foreign governments directly. Under traditional common law rules the plaintiffs are able to obtain personal jurisdiction by serving a complaint directly on the foreign official during the course of his visit. Foreign governments—to say nothing of the individual officials themselves—frequently react with surprise and dismay to such lawsuits, especially when the subject matter of the litigation concerns the policies and practices of that foreign government with respect to its own citizens within its own territory. In some cases, in fact, there may be no substantive nexus—no legal or factual connection—with the United States, other than the temporary, transient presence of the individual defendant. Although European legal systems may be structured differently, visiting current and former U.S. officials have also found themselves subject to legal process on matters wholly unrelated to their presence abroad.

As a general matter, it would be best if allegations of human rights abuses by foreign governments and government officials were resolved under the rule of law in their own courts. Effective human rights protection and enforcement begins at home. But certainly, if such suits or legal process are based merely on the transitory presence in another country of foreign government officials traveling on official business, this creates severe strains on foreign policy interests. Responsible officials may be deterred from carrying out a wide range of legitimate functions, including important diplomatic initiatives, humanitarian activities, and actions crucial for common defense, peacekeeping missions and interventions in foreign crises or civil wars.

When the issue involves formal criminal charges, the risks of political confrontation are even larger. Depending on the specific jurisdiction, criminal cases may not be subject to direction and control by the responsible political authorities any more than civil suits. This in-

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\* Editor's note: The Alien Tort Statute, which is addressed at some length in the full text of Mr. Bellinger's remarks, is discussed in Chapter 6.H.5.a.



creates the possibilities for abuse. A zealous prosecutor or investigating magistrate can make dramatic news just by compelling testimony or demanding documents from foreign officials rather than working through government-to-government channels.

This problem is not confined to the United States, and our governments must work together to find solutions to ensure that public officials can effectively carry out their responsibilities. To the extent that information is legitimately required—for example, to further an administrative or criminal investigation—this need can normally be met through appropriate government-to-government channels on a case-by-case basis rather than by asserting jurisdiction over an individual official. More generally, we have been working, and we will continue to work energetically with foreign governments to determine whether other solutions, including treaty-based solutions, should be pursued to prevent disruption of official travel.

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### 3. Carriage of Goods Convention

On November 3, 2005, Mary Helen Carlson, Attorney-Adviser, Office of the Assistant Legal Adviser for Private International Law, and head of the U.S. delegation in negotiation of the draft UN Commission on International Trade Law (“UNCITRAL”) carriage of goods convention [wholly or partly] [by sea], addressed the Maritime Law Association of the United States on the status of those negotiations. Excerpts below from Ms. Carlson’s remarks review major issues in the negotiation from the U.S. perspective including scope, liability of the carrier and shipper, liability limits, jurisdiction and arbitration, and freedom of contract. Footnotes, which include relevant draft convention language, have been omitted.

The full text of Ms. Carlson’s remarks is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The text of the draft as of the end of 2005, U.N. Doc. A/CN.9/WG.III/WP.56, and U.S. comments provided in August 2003, A/CN.9/WG.III/WP.34, are available at [www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html); see also *Digest* 2003 at 843-47; *Digest* 2004 at 815-18.

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## PART II—SIGNIFICANT PROVISIONS OF THE DRAFT CONVENTION

One of the most important aspects of the draft convention is the range of issues it covers. [The 1936 U.S. Carriage of Goods by Sea Act (“COGSA”)], the [1924] Hague, [1968] Hague-Visby and [1992] Hamburg Rules all are limited mainly to liability issues. This convention covers a much broader range of issues. In addition to the ones we will discuss today (scope, liability of the carrier and shipper, liability limits, jurisdiction and arbitration and freedom of contract) the convention also covers electronic transactions, transport documents, transfer of rights and right of control, and delivery to the consignee. It takes time to reach a consensus on all of these issues, especially those that have never before been the subject of an international convention. Given the complexity of the task, it will be quite an accomplishment to have this convention ready for signature by the end of 2007.

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### A. SCOPE OF COVERAGE

1. What is the **geographic scope** of the convention (port-to-port, tackle-to-tackle, or door-to-door)?

The approach that has been tentatively agreed to is a modified door-to-door approach that has come to be called a “maritime plus” or “limited network” regime. This means that, when there is a through bill of lading covering a multimodal shipment, and one of the legs of the journey is by sea, then, as between the parties to the contract, the convention’s terms, including its liability terms, apply, regardless of whether the damage occurred on the ocean leg or during the inland carriage. This is a huge improvement over the current situation where the liability rules depend on where the damage occurred. This uncertainty is the cause of much litigation.

There is one significant exception to this regime. Many European countries initially opposed a door-to-door scope because of fear that it would conflict with existing European unimodal regimes, such as the CMR and CIM-COTIF (the European road and

rail conventions). The draft convention deals with this by providing that, when it can be proved that the damage occurred during land transport that would, absent this convention, have been subject to a mandatorily applicable international convention, then that land convention will apply.

The above approach has tentatively been agreed to by the UNCITRAL Working Group and is consistent with the U.S. (and MLA) position.

**2. Who** is covered by the convention? (Treatment of Performing Parties)

The Hague Rules and COGSA were developed at a time when multimodal shipping contracts were much less common, and therefore it was appropriate that those rules regulate the relationship between the contracting shipper and the contracting carrier. The early regimes did not address the responsibilities of parties, other than contracting parties, who actually performed the contract. . . . Under modern commercial shipping practices, and with the increasing number of door-to-door contracts, more and more of the contracting carrier's responsibilities are performed by others.

It was not possible, either within the United States, or internationally, to achieve support to apply the convention's rules to suits against inland performing parties (i.e., trucks and railroads). But there was widespread support for applying the convention to (in addition to the parties to the contract) maritime performing parties (e.g., terminal operators and stevedores). This is an improvement over current law. Cargo claimants will be free to sue inland performing parties (trucks and railroads) as they do today under national law.

The above approach has tentatively been agreed to by the UNCITRAL Working Group and is consistent with the U.S. (and MLA) position.

**3. What** (which transactions) is covered by the convention?

From the beginning of this project, . . . [e]veryone has agreed that, generally speaking, the instrument is intended to cover contracts in the liner trade because they are less likely to be negotiated individually and because a certain inequality of bargaining power between the shipper and the carrier has been assumed. Likewise, ev-

everyone has agreed that the instrument should not cover the tramp trade, where individually negotiated charter parties and an equality of bargaining power are normal. But there has been considerable disagreement as to how to reduce this substantive consensus into treaty language. Three different approaches were identified for defining the scope of application. These came to be called the “documentary” approach, under which the application of the Convention would turn on the issuance of a particular type of document, the “contractual” approach, under which application would depend on the parties’ concluding a particular type of contract, without regard to whether a particular document was issued, and the “trade” approach, in which application of the convention would turn on the trade in which the carrier was engaged. All of these approaches have strengths and weaknesses. Any of them would work for the vast majority of transactions that everyone agrees should clearly fall within or without of the convention. But, with each approach, there is a danger that some transactions at the margins would accidentally be included or excluded from the scope of the convention.

The Working Group has developed a hybrid proposal that we like to characterize as an “elegant solution” that takes advantage of the strengths of each of the three approaches, while minimizing the weaknesses. . . . The UNCITRAL Working Group concluded that the hybrid proposal is a “sound text on which to base future discussion.” The U.S. supports this approach.

#### B. LIABILITY OF THE CARRIER/BURDEN OF PROOF

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The draft instrument eliminates the error of navigation defense. It retains all of the other COGSA defenses, although many of them are modified. For example, the traditional fire defense has been limited to fire on the ship, a change required because the new convention will apply (as between the contracting carrier and the shipper) to multimodal door-to-door shipments, and it was thought unnecessary for the fire defense to apply to fires on land. The exception for saving or attempting to save life at sea has been retained, but, the exception for saving or attempting to save property has been modified to “reasonable measures” to save or attempt to

save property. An exception has been added for “reasonable measures to avoid or attempt to avoid damage to the environment.”

The order of the burden of proof is not covered by COGSA or the Hague Rules, but it is included in the draft convention. With one exception, the draft convention applies basically the same shifting burden of proof as has been imposed by U.S. courts, which have compared the process to a ping-pong game. The one change is for the last volley of the ping-pong game, and it concerns situations where the damage is attributable partially to something for which the carrier is liable, and partially to something for which the carrier is not liable. It is often impossible to determine the extent of damage caused by each. The U.S. courts follow a rather harsh rule which does not allow for equal or proportionate allocation of the loss but instead states that in such cases the carrier must bear the entire loss. The draft instrument includes a proportionate fault rule that states that in such cases the carrier is only liable for the part of the loss that is attributable to the event or occurrence for which it is liable, and that liability must be apportioned on the basis of the rules set forth in the convention. This should result in a more balanced and fair outcome.

The draft instrument’s treatment of the carrier’s liability has been tentatively approved by the Working Group, and it is consistent with the U.S. (and MLA) position.

### C. OBLIGATIONS OF THE SHIPPER

The principal obligation of the shipper under COGSA and the Hague Rules relates to the shipment of dangerous goods. The draft instrument would impose a wider range of obligations on the shipper, including obligations concerning delivery of the goods to the carrier and obligations concerning the furnishing of information. . . . The articles on shipper’s obligations have not been discussed in depth, and are scheduled to be considered by the UNCITRAL Working Group at its next negotiating session in November 2005.

### D. LIMITATION OF LIABILITY/DELAY

The liability limitations are likely to be the last thing agreed upon in this negotiation. The United States is in favor of adopting

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the Hague-Visby limitation amounts. In the very brief discussion of this topic thus far, a number of delegates have expressed support for the Hamburg Rules limitation (which is 25% higher than the Hague-Visby limits) and a few have argued for limitation amounts comparable to the much higher levels found in the European road and rail conventions.

The draft instrument has a special limitation for damages (including consequential damages as well as direct damages) caused by delay. Delay is determined by reference either to a delivery time agreed to by contract, or to a “reasonable” time. . . . The United States opposes the inclusion of consequential damages for delay, unless this has been expressly agreed to by the parties. The inclusion of consequential damages inserts a strong element of unpredictability into what should be a predictable risk calculation by shippers, carriers and insurers. So far, we have not been able to persuade the Working Group to adopt our position. We will continue work on this.

### E. JURISDICTION AND ARBITRATION

Prior to the Supreme Court’s *Sky Reefer* decision, the U.S. courts uniformly held that COGSA prohibited foreign forum selection clauses. In *Sky Reefer*, the Court overruled these cases and applied the general rule that forum selection clauses are presumptively enforceable. As a result, U.S. cargo interests, and many in this organization, made reversing *Sky Reefer* one of their primary objectives. . . . All affected U.S. parties eventually agreed to submit to UNCITRAL a U.S. position that a plaintiff in a non-service contract would be able to choose the forum; and that forum selection clauses in service contracts would be enforceable between the parties to the contract, and, subject to certain conditions, against third parties.

There has been a great deal of discussion about jurisdiction and arbitration in the Working Group, and these issues have not been resolved. . . .

### F. CONTRACTUAL FREEDOM

COGSA, amendments to COGSA [proposed by the MLA in the late 1990s] and all of the existing multilateral conventions are

“one-way mandatory,” i.e., the rules state that contracts must not derogate from the convention to the detriment of the shipper, but derogation that increased the carrier’s obligations is allowed. . . . The [National Transportation League/World Shipping Council (“NITL/WSC”)] proposal on freedom of contract, which, with some modification, has become the U.S. position, calls for allowing service contracts to derogate from any and all of the terms of the convention. The rationale is that the existing mandatory regimes were developed for a commercial context that no longer existed, and that they do not meet today’s commercial realities. It can no longer be assumed that the carrier always has the more powerful bargaining position with regard to a shipper; nor can it be assumed that transport contracts are always adhesion contracts, which the shipper must take or leave.

There was nothing in the [Comité Maritime Internationale (“CMI”) initial draft of the convention] on freedom of contract. When the United States first proposed to UNCITRAL that the new convention should allow parties to a service contract to opt out of one or more of the convention’s rules, there was strong opposition to our proposal. There was objection to the use of the term “service contract,” which is unknown in most of the world, and seemed to be designed specifically for the United States. And there was a more basic objection to the whole notion of freedom of contract from countries that take a more regulatory approach to trade issues, as opposed to the free-market approach the United States was endorsing. . . . At its last meeting in April 2005, the UNCITRAL Working Group tentatively agreed to a proposal that would allow “volume contracts” (a more neutral term than “service contracts”), under certain conditions that would ensure that the shipper was not taken by surprise, to derogate from all but a few of the convention’s rules. . . .

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#### **4. Electronic Commerce**

On November 23, 2005, the UN General Assembly adopted the UN Convention on the Use of Electronic Communications in International Contracts. U.N. Doc. A/RES/60/21. The text of the convention, agreed at the UNCITRAL thirty-eighth session in

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Vienna on July 15, 2005, is attached to the resolution. The text and *travaux préparatoires* are available at [www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf](http://www.uncitral.org/pdf/english/texts/electcom/2005Convention.pdf). The UNCITRAL report on the work of its thirty-eighth session, U.N. Doc. A/60/17, is available from a link at [www.uncitral.org/uncitral/en/commission/sessions/38th.html](http://www.uncitral.org/uncitral/en/commission/sessions/38th.html).

The United States was actively engaged in the negotiation of the convention, which began in 2001. On July 4, 2005, at the opening of the 38th session, the United States expressed its support for the revised draft (A/CN.9/577) to be considered for adoption, with certain recommendations. The full text of the U.S. statement, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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We generally support the revised text, subject to [certain specified] recommendations and to such drafting and other recommendations as may be made at the Plenary. We believe that the Commission's Working Group IV on Electronic Commerce has done an effective job of developing wide support amongst States for the draft convention, which will establish common basic rules to facilitate and validate electronic commerce between widely separated markets with differing legal regimes, thus linking many paths to world trade and domestic development. The convention system would not require anyone to use or accept electronic messages and recognizes party autonomy by protecting the right of parties to vary the substantive provisions of the treaty, as well as protecting government agencies' needs to determine the appropriate methods for conduct of public matters.

The convention would also facilitate application of existing treaties and other international instruments to the extent that States wish to do so. While electronic commerce has become integral to many national economies, it is still too early in its development to apply rules without allowing States to adjust that application in various sectors or with regard to particular transactions or practices or otherwise to meet their economic needs. Thus, in ad-



dition to exclusions in Article 2, States would be able to exclude other matters under Articles 18 and 19.

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The final text preserved the principle of party autonomy in the handling of transactions and adopted an approach largely consistent with uniform U.S. state and federal law. The Convention text therefore provides default rules for the substantive contract law provisions, allowing commercial parties to fashion their obligations otherwise. Commercial parties on the other hand could not amend the provisions relating to scope of application, treaty law, or the wording or effect of formal declarations, which ratifying states are permitted to make. Among other issues that were important to the United States, the negotiating states also agreed that receipt at a designated e-address would not be deemed to have occurred, but would instead be subject to a rebuttable presumption, thus protecting commercial parties' use of reasonable security such as access controls and spam and virus blockers that may prevent or delay receipt. While some countries sought an affirmative rule, without a rebuttable presumption, the United States opposed that result in view of increasing problems encountered with regard to certainty of delivery and receipt of messages, as well as the effects of continuously changing technologies. Input errors in certain automated transactions may be withdrawn, subject to strict limitations, and financial sectors such as securities markets, foreign exchange transactions, swaps, and derivatives, as well as consumer matters, were among the exclusions to coverage. E-signature provisions, under discussion for over a decade, are closer to U.S. positions than any previous international text. The United States has led the effort to allow commercial party freedom to use any method of e-signature and at its option assume any measure of risk appropriate to the business transactions involved. The European Union has instead adopted in its internal e-commerce Directives a regulatory and technology-specific approach, granting legal certainty only to e-signatures that adopt public-key ("PKI") technology, which in turn requires creating an organizational and legal in-

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frastructure. The United States has opposed that system for general commerce, arguing that it results in substantial added costs, burdens commerce, and enhances the difficulty for less-developed countries to benefit from the cost savings and efficiency inherent in electronic commerce. *See also* discussion of European Community proposal discussed in Chapter 4.A.3.c.

### 5. Space Equipment Finance

In 2004 the United States ratified the 2001 Cape Town Convention on International Interests in Mobile Equipment and the related Aircraft Protocol. *See Digest 2004* at 834-36. Additional protocols covering railway equipment, space equipment, and agricultural, construction, and mining equipment, are under consideration. In a letter of December 1, 2005, to Martin J. Stanford, Deputy Secretary General of UNCITRAL, Harold Burman, Attorney-Adviser, Office of the Assistant Legal Adviser for Private International Law, set forth the views of the United States on the draft protocol for space equipment finance. The substantive paragraphs of the letter follow; the full text is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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You have requested confirmation of our views previously expressed in order to assess whether sufficient support exists to schedule the next intergovernmental meeting on this matter. At the outset let me make clear that we believe that progress on the present draft protocol on space asset financing is important for the ability of commercial activities in outer space to progress beyond the place where they have leveled off, or even to maintain that level in the future. We believe all nations will benefit from expanding the range and depth of commercial activities in outer space.

The timing is now right to resume intergovernmental work. The Cape Town Convention and the Protocol on aircraft financing will come into force in March 2006 (the necessary eighth ratification just having been deposited), and the new international finance registry is now undergoing operational testing in Dublin, Ireland.

We are thus already creating valuable experience which will facilitate our work on the space assets protocol. While we attempt to negotiate this protocol, available financing and insurance for space operations has remained far behind growing financial pools for other sectors. The largest sources of commercial finance will not enter the space assets finance arena unless and until there is a legal basis for secured finance rights and priorities. In the absence of this draft protocol, there is no reliable basis for such secured finance rights on the international level. Reference alone to nationally-based rights has no reliability of enforcement in any other jurisdiction (something the Cape Town Convention was designed to overcome), and the UN's Outer Space Treaty system casts doubt on the validity of seeking to extend national laws into outer space for that purpose. On the last point, we support the provision that assures that this protocol will not affect any rights and obligations of any state party to the UN's Outer Space treaties.

Completion of the space assets protocol thus becomes the single initiative at the international level that can fill this gap and provide a basis to bring in less costly and more reliable financing. There are some who favor waiting for the space industry to mature, noting that the aircraft industry had over 60 years experience with the commercial finance field before negotiating the Cape Town Convention's first protocol on aircraft finance. The other view, one that we are in agreement with, is that we have a window now that if missed will put off these developments for many years, and we can build support for the space protocol on the current attention in a number of countries on implementation of the aircraft protocol. Engaging aerospace and financing interests now on the benefits of the space assets protocol will enhance the likelihood of getting support for the final text.

We would like to comment briefly on three aspects of this work.

First, it is important to recognize that our task is to make the protocol for space assets reasonably competitive with commercial aircraft financing, in order to attract support from capital markets that exist for the aerospace sector. We recognize the necessity of deferring to national regulatory regimes on certain matters such as capacity and license to operate, non-transference of certain data and technology, and related national security matters. This is a factor in

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aircraft acquisition and operations as well, but generally absorbed in existing financing practices and therefore not a problem in that sector. It is however a problem considerably more pronounced for space assets. Broad deference to national regulatory systems, unless constrained through optional declarations as to transparency, time limits for approvals, etc., will for certain countries sharply limit the credit benefits of this protocol. Of perhaps greater concern there have been proposals to impose mandatory public service obligations on secured lenders if they seek to enforce their rights where default has occurred. This approach may eliminate the potential economic benefits of this exercise. Today, outside of this protocol, if a country chooses to place public services on a commercial, rather than a government controlled or owned platform, they take the risk of losing those services if the primary operator cannot continue. Secured lenders cannot be used to cover that risk, and maintaining an open-ended public service operations requirement, other than for limited and specified emergency operations, would effectively keep secured lenders from financing under such a protocol. One option is that if continuation of such services were mandated, a government would undertake as a treaty matter the obligation to acquire that capacity in full and present time compensation.

Secondly, in order to make space asset and operations financing competitive with the aircraft sector, and to balance the negative credit effect from broad deference to national regulatory regimes (because of the uncertainty and delay that results), it is very important that additional economic assurances be added to the draft protocol. These include assurances of rights to the income stream from satellite and other space equipment operations pending determination whether the secured lender can in fact be a transferee; rights to structure income streams offshore or otherwise repatriate income; assurances that operations facilities and maintenance of satellite capacity will not be allowed to deteriorate during such period; and optional provisions for pre-qualifying and approval of back-up operators in the event a secured lender needs to enforce its rights. These enhancements are a minimal threshold, and more may be considered as necessary to bring the otherwise risky sector of space asset financing into competitiveness with other areas of aerospace, if the protocol is to achieve actual economic value.

Thirdly, development of the notice-filing finance registry system should go forward now. It is important that that be done on the basis of what works functionally and at low cost. As with the aircraft finance registry, decisions should be made on technical capacity to identify, file and search, and whether the search results meet credit industry needs, period. Practical filing issues involving components can be accommodated without resolving priority issues, which in practice is always subject to inter-creditor agreement. Costs of the system and access fees must be kept low, and this may be achievable by building on existing systems and proposals for assistance.

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## **6. Uniform Mediation Act of 2005**

On June 9, 2005, Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, testified before the Committee on the Judiciary of the Council of the District of Columbia, which was considering adoption of the Uniform Mediation Act of 2005. Mr. Kovar was also head of delegation for the United States at the negotiation of the UNCITRAL Model Law on International Commercial Conciliation and participated in the development of the Uniform Mediation Act ("UMA") by the National Conference of Commissioners on Uniform State Laws, which incorporates the UNCITRAL Model Law. Excerpts below provide background on the Model Law and the UMA. The District of Columbia considered the act in a first reading on December 6, 2005; final action was anticipated in early 2006.

Information on adoption of the UMA by states in the United States is available at [www.nccusl.org/Update/ActSearchResults.aspx](http://www.nccusl.org/Update/ActSearchResults.aspx).

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The negotiations of the Model Law were conducted over two years. Fifty UN member states participated and more than two-dozen international organizations, ADR institutions, and other interested groups contributed as observers. The United States delegation was

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represented by the Department of State, and included advisers affiliated with the Uniform Law Commissioners and American Bar Association, the American Arbitration Association, and the Maritime Law Association.

The Model Law was adopted by UNCITRAL on June 28, 2002, and recommended by the UN General Assembly on November 19, 2002, to the over 190 member countries of the United Nations. To the extent that a jurisdiction adopts the UNCITRAL Model Law, it will be seen worldwide as a more predictable, more favorable forum for mediation of international disputes. The text of the Model Law, as well as a guide to enactment and use, may be found at *www.uncitral.org*.

The Uniform Mediation Act bill before you today incorporates by express reference the UNCITRAL Model Law in section 16-5110. The Uniform Law Commissioners adopted the original text of the UMA in 2001. Following adoption of the UNCITRAL Model Law in 2002, the UMA was amended in 2003 to incorporate the Model Law. The purpose of the Model Law, and the reason for its incorporation in the Uniform Act, is to provide a harmonized legal foundation to assist parties to international transactions use mediation to resolve their commercial disputes.

Like the UMA, the Model Law provides basic rules intended to preserve the essential confidentiality of the mediation proceedings and strict limits on the use of information in subsequent judicial or arbitral proceedings. The Model Law goes beyond the UMA to provide default rules for parties on the appointment of the mediator or mediators and conduct of the proceedings. Unlike the UMA, however, the Model Law is intended only for commercial disputes involving international business parties and transactions.

The Model Law uses the term “conciliation” in a broad sense, covering all forms of international commercial mediation, conciliation, and other comparable methods of non-binding alternative dispute resolution. For purposes of the UMA, the terms “mediation” and “conciliation” are synonymous.

The Model Law also has confidentiality and privilege provisions. Although no conflict is envisioned between these provisions and the Uniform Act, the UMA provides that its privilege provisions shall apply—rather than try to blend the Model Law provi-

sions with those in the UMA. Moreover, the UMA clarifies that “nothing in Article 10 of the Model Law (the privilege section) derogates from Sections 4, 5, and 6” (of the Uniform Mediation Act). The effect is that any potential or perceived conflicts are resolved in the favor of the rules already in the Uniform Mediation Act.

Adoption of the Model Law by the District of Columbia would provide assurance for foreign parties that Washington DC is a familiar and hospitable jurisdiction for the conduct of international commercial mediation. Therefore, we urge that the Committee give prompt and favorable consideration to this important legislation.

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## 7. Other Issues

In a memorandum of August 2005, Mr. Burman provided a summary of developments in private international commercial law for the ABA Section on International Law and Practice. Excerpts below address issues not already discussed in this chapter.

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### Commercial arbitration:

Uncitral has continued to seek to work out rules on several areas of commercial arbitration practice, including revisions to the widely used UN Model law on arbitration relating both to the form of agreement and the controversial areas of *issuance and enforcement of orders for interim relief, including ex parte orders*. The advantages of resolving these often encountered problems, and the limitations currently applied to them in many areas of commercial arbitration, are seen by some as risking introduction of the litigation field and its precedents into arbitration. Progress has been slow, although completion of this work is targeted for mid-2006. A review of country practices in arbitration under the New York Convention and the Panama Convention continues, but no agreement has been reached on what to do with the results, and whether to entertain any proposals for amendments to either convention. Future work in this

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field will be considered at a conference in Vienna in April 2006 commemorating the Uncitral model arbitration rules.

### Investment securities:

*Unidroit draft convention on transactional law on cross-border securities transactions*—the first intergovernmental negotiation took place in Rome in May 2005, a second was deferred until March 2006 to allow informal negotiations to proceed, the first of which will take place in Bern in September. This also will permit bilateral US-EU talks to proceed, as well as discussions between central banks and other agencies with regulatory responsibilities. The US supported the initial draft approach focused on modern intermediated stock holding systems, allowing rights and interests to move by computer as contemplated by revisions to UCC Article 8. Countries with other types of systems, not geared for high volume, intermediated systems or netting, have sought however to also be covered by the rules, which poses a very difficult challenge. The US has stated that it would support the new effort as long as it remains consistent with the 2002 Hague Convention on law applicable to intermediaries, which seeks to provide predictability in a world of data moving rapidly across borders. A possible joint signing of the Hague Convention by the US, Switzerland and Japan is under informal discussion.

### Procurement:

Uncitral continued its work on updating its previous *model laws on procurement of goods, services and construction* which have been used by a number of developing countries to reform their public and publicly-assisted areas of acquisition, a large overall sector in many countries. Adoption of these instruments is intended to facilitate better commercial and other practices as well as streamline economic activities in developing countries while reducing corruption and fraud. The current project has emphasized new rules to *facilitate electronic procurement*, and may be completed in 2007 or possibly earlier.

### Cross-border insolvency law:

Major developments continue to move forward in this field, which has become an integral part of trade finance as well as the



means by which developing countries can provide for management of economic downturns and avoidance of meltdown risk. The US enacted this year the *1997 Uncitral Model law on cross-border insolvency procedure* as the new Chapter 15 of the US Bankruptcy Code. . . . [T]he Judiciary Committees agreed to recast that portion of the bill so it resembled the UN Model law, so that the US, the IMF, the World Bank and others could promote its adoption by other countries.

Prior to that, Uncitral completed its *new legislative guide to insolvency law reform*, which is expected to become a major component of the new international standards by which the World Bank and IMF assess performance of recipient states. Future work in this field will be considered at a colloquium in Vienna in November 2005, which is likely to focus on upgrading the concept of “protocols” between courts or other authorities of states wishing to rationalize the handling of cross-border bankruptcy cases; rules to handle the increasing phenomena of groups of companies subject to insolvency risk; and post-commencement financing to facilitate workouts.

General principles of international commercial law:

Unidroit completed its 2004 edition of its widely-used “International Principles” by adding new chapters on a number of areas of commercial and contract practice. Recommendations are being sought by Unidroit as to appropriate topics which would be important in transactions or other international applications to be added in the next phase to this document.

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**B. FAMILY LAW**

**International Recovery of Child Support and Other Forms of Maintenance: Reciprocating Countries for Enforcement of Family Support Obligations**

During 2005 Hungary and Costa Rica were declared to be “foreign reciprocating countries” for the purpose of the enforcement of family support obligations. Pursuant to 42 U.S.C. § 659A, the Secretary of State, with the concurrence of

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the Secretary of Health and Human Services, is authorized to make such declarations of foreign countries or their political subdivisions if the country has established, or has undertaken to establish, procedures for the determination and enforcement of duties of support for residents of the United States. The procedures must be in substantial conformity with the standards set forth in the statute. Declaring a country to be reciprocating entitles a person residing in the reciprocating jurisdiction to enforcement of a family support obligation against a person residing anywhere in the United States. *See Digest 2001 at 49–51.*

The statute permits such declarations to be made “in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis.” For Costa Rica, a U.S.-Costa Rica agreement for this purpose was signed on February 16, 2005, the first with a country in Latin America. As to Hungary, the United States declaration, made on March 3, 2005, will become effective on the date when Hungary makes a parallel reciprocal declaration.

As with other U.S. bilateral child support arrangements, neither of the two arrangements imposes an obligation on any U.S. authority to facilitate the recovery of maintenance from a U.S. non-custodial parent in circumstances where the child has been wrongfully removed or retained. The U.S. declaration as to Hungary included a statement that the declaration “shall not apply in cases where such application would be manifestly incompatible with United States public policy” to further assure U.S. left-behind parents that such arrangements will not adversely affect their interests. This statement will be included in future agreements and declarations.

### C. JUDICIAL ASSISTANCE

#### 1. Service of Process in the Russian Federation

On May 19, 2005, Edward A. Betancourt, Director, Office of Policy Review and Inter-Agency Liaison, Directorate of Over-

seas Citizens Services, Bureau of Consular Affairs, responded to an inquiry concerning procedures for effecting service of process in the Russian Federation. Mr. Betancourt explained the current difference of opinion between the United States and Russia regarding a fee imposed by the United States for service of process by a private contractor. The letter stated that it "is not an opinion on any aspect of U.S., Russian, or international law," and that the Department of State "does not intend by the contents of this letter to take a position on any aspect of any pending litigation." Mr. Betancourt's letter, excerpted below, is available in full at [www.state.gov/l/c8183.htm](http://www.state.gov/l/c8183.htm).

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In July 2003, Russia unilaterally suspended all judicial cooperation with the United States in civil and commercial matters. Russia refuses to serve letters of request from the United States for service of process presented under the terms of the 1965 Hague Service Convention or to execute letters rogatory transmitted via the diplomatic channel. Russia also declines to give consideration to U.S. requests to obtain evidence. While the Department of State is prepared to transmit letters rogatory for service or evidence to Russian authorities via the diplomatic channel, in our experience, all such requests are returned unexecuted. Likewise requests sent directly by litigants to the Russian Central Authority under the Hague Service Convention are returned unexecuted.

On June 1, 2003, the United States imposed a new fee for service of foreign documents in the United States by a private contractor hired by the U.S. Department of Justice, the U.S. Central Authority for the Hague Service Convention. This fee applies to Hague Service Convention requests and non-treaty requests from foreign governments (letters rogatory) received via the diplomatic channel. Such fees are permitted under the Hague Service Convention and routinely charged by many States party to the Convention.

Between October 28-November 4, 2003, a Special Commission on the Practical Operation of the Hague Service, Evidence and Legalization Conventions convened at The Hague. See [http://hcch.evision.nl/upload/wop/lse\\_concl\\_e.pdf](http://hcch.evision.nl/upload/wop/lse_concl_e.pdf). The Special Commission's

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Conclusions and Recommendations of November 4, 2003, page 20, paragraph 53, provide:

“The Special Commission reaffirmed that according to Article 12(1), a State party shall not charge for its services rendered under the Convention. Nevertheless, under Article 12(2), an applicant shall pay or reimburse the costs occasioned by the employment of a judicial officer or other competent person. The Special Commission urged States to ensure that any such costs reflect actual expenses and be kept at a reasonable level.”

The Russian Federation did not support this recommendation and reserved its position.

On December 3, 2004, the Russian Federation deposited a declaration with the Government of the Netherlands, the treaty depository, naming a Central Authority and taking a reservation regarding certain aspects of the treaty. See [http://www.hcch.net/index\\_en.php?act=status.comment&csid=418&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=418&disp=resdn). The declaration provides:

“The Russian Federation assumes that in accordance with Article 12 of the Convention the service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed. Collection of such costs (with the exception of those provided for by subparagraphs a) and b) of the second paragraph of Article 12) by any Contracting State shall be viewed by the Russian Federation as refusal to uphold the Convention in relation to the Russian Federation, and, consequently, the Russian Federation shall not apply the Convention in relation to this Contracting State.”

The Department and the Russian Foreign Ministry have exchanged several diplomatic notes setting out our respective positions on the matter, and met twice in Moscow to explore ways to provide normal judicial cooperation. We hope to meet again this year.

Since the Russian suspension of U.S. judicial assistance requests in civil and commercial matters, we advise litigants that they may

wish to seek guidance from legal counsel in Russia regarding alternative methods of service. The United States has informed the Russian Federation on numerous occasions that in the absence of a direct channel for U.S. judicial assistance requests, U.S. courts and litigants will find other methods to effect service of process. Where service is effected by an agent in Russia, such as a Russian attorney, such a person may execute an affidavit of service at the U.S. embassy or consulate in Russia as a routine notarial service.

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## **2. Award of Attorney's Fees and Expenses for Non-Appearance of Defendant at Deposition**

On March 4, 2004, the U.S. District Court for the Middle District of Florida ordered a defendant in a case to pay the plaintiff \$5,249.50 "as a sanction for failing to attend the first day of her deposition in Germany." *Heller v. Caberta*, Case No. 8:00-CV-1528-T-27C. The court explained that the Eleventh Circuit had affirmed the dismissal of the case and remanded for a determination of attorney's fees and costs to be awarded for this purpose.

In a note verbale to the U.S. Department of State, the Embassy of the Federal Republic of Germany stated, among other things, that the action violated Article 16 of the March 18, 1970, Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the relevant exchange of notes between the Federal Republic of Germany and the United States of America. The United States replied by diplomatic note of March 14, 2005, set forth in full below.

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The Department of State refers to the note No. 112/2004 from the Embassy of the Federal Republic of Germany regarding the decision of the U.S. District Court, Middle District of Florida, in *Heller v. Caberta* (No. 8:00-CV-1528-T-27C). The Embassy of the Federal Republic of Germany expresses the view that the award of attorney's fees and expenses ordered by the District Court is in violation of Article 16 of the 1970 Hague Convention on the Taking of Evi-

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dence Abroad in Civil or Commercial Matters and the relevant exchange of notes between the Federal Republic of Germany and the United States.

According to the decision of the District Court, the 1970 Hague Evidence Convention did not apply in this case because the Court had personal jurisdiction over the defendant in Florida. As a result, discovery was conducted under the Federal Rules of Civil Procedure and the defendant was ordered to appear for deposition in Florida. However, consistent with the direction of the United States Supreme Court in *Aerospatiale v. U.S.*, 482 U.S. 522 (1987), to take special care of any problems that might arise for foreign litigants on account of their nationality or location, the District Court offered the German national defendant the option of providing deposition testimony in Germany.

Subject to a valid order to appear in Florida, the German national defendant voluntarily agreed to be deposed in Hamburg instead of taking on the extra cost to her of being deposed in Florida. However, the defendant failed to appear as directed by the District Court, causing the plaintiff to incur unnecessary expenses as a direct result of her actions.

Rule 37(d) of the Federal Rules of Civil Procedure directs a federal court to assess charges of fees and costs against a party for failing to appear at its own deposition. If the court finds justification for a party's failure to appear or other circumstances that would make an award of fees and costs unjust, the court can choose not to order payment. In this case, the court found the defendant's actions to be dilatory and unjustified after several attempts were made to accommodate her schedule. Although the court styled its order of fees and costs "sanctions," this is simply the term used by the Federal Rules of Civil Procedure for compensation paid to the party to a deposition that has suffered unnecessary costs. It is not a coercive action, and in this case was assessed after the deposition was completed and the case was dismissed in favor of the defendant.

The exchange of notes between the Ministry of Foreign Affairs of the Federal Republic of Germany and the Embassy of the United States of America concerning legal assistance in civil and commercial matters, dated October 17, 1979, and February 1, 1980, state that no "pressure [can be] brought to bear on the person to be ques-

tioned to make him appear or provide information, more specifically . . . that no coercive measures [can be] threatened in the event that a person does not appear or refuses to provide information.” No “pressure” or “coercive measures” were threatened in this case against the defendant to compel her to appear at her deposition in Germany. Rather, the defendant was ordered to compensate plaintiff for causing unnecessary expenses when she failed to appear as scheduled. In the view of the Department of State, the procedure provided in the relevant exchange of notes and the Hague Evidence Convention would be vulnerable to bad faith abuse if a party felt she could violate even voluntary arrangements without incurring any responsibility to pay the predictable losses suffered by the other side resulting from her failure to abide by those arrangements.

#### **D. INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS**

##### **1. Concurrent Proceedings in Foreign Courts**

###### ***a. Comity-based abstentions***

- (1) *Johns Hopkins Health System Corp. v. Al Reem General Trading & Company’s Rep. Est.*

In *Johns Hopkins Health System Corp. v. Al Reem General Trading & Company’s Rep. Est.*, 374 F. Supp. 2d 465 (D. Md. 2005), plaintiffs John Hopkins University, The Johns Hopkins Health Systems Corporation and Johns Hopkins International (collectively “Johns Hopkins”) entered into a Business Development Agreement (“BDA”) with Al Reem General Trading & Company’s Representation Establishment (“Al Reem”), a United Arab Emirates (“U.A.E.”) company principally located in Abu Dhabi, U.A.E. Pursuant to the agreement, Al Reem agreed to promote Johns Hopkins in the U.A.E. so that medical professionals would refer patients to Johns Hopkins for treatment and assist Johns Hopkins in broadening its business activities in the U.A.E. The agreement provided that a percentage of proceeds from Al Reem referral patients would be set aside and, after certain expenses were paid, divided

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between Johns Hopkins International and Al Reem. Johns Hopkins opted not to renew the BDA on June 16, 2000.

On July 29, 2000, Al Reem sued Johns Hopkins in the U.A.E. seeking money for services it claimed to have provided pursuant to the 1999 agreement. Al Reem also sought compensation under a 1998 agreement, which Johns Hopkins claimed was forged by Al Reem. The U.A.E. Federal Court of First Instance appointed an Independent Accounting Expert in April 2003 to take evidence, review the case, meet the parties, and submit a report to the court with suggestions and findings. The expert was to address only damages, and not Johns Hopkins' claim that the 1998 agreement was a forgery.

Finding the U.A.E. proceeding unsatisfactory, Johns Hopkins filed this suit in U.S. court against Al Reem on October 8, 2004, seeking a declaratory judgment that the 1998 BDA was invalid and damages for Al Reem's breach of the implied covenant of good faith and fair dealing related to their 1999 agreement.

The court denied Al Reem's motion to dismiss, or in the alternative, to stay proceedings on the grounds of, *inter alia*, international comity. Excerpts follow from the court's analysis of the comity issue.

\* \* \* \*

The more common abstention dilemma faced by federal courts is when there are parallel state court proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800. . . (1976), set out the factors often relied upon by district courts in making the decision whether to refrain from exercising jurisdiction in deference to an ongoing state suit. Courts have applied those same factors in cases where there are concurrent federal and foreign proceedings. . . .

\* \* \* \*

When the foreign proceeding is a declaratory judgment action, a more liberal "discretionary" standard is applied. *Wilton v. Seven Falls Co.*, 515 U.S. 277 . . . (1995). In applying this standard, additional factors are considered, including: (1) the scope of the pend-



ing parallel proceeding; (2) the nature of the defenses open there; (3) whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; and (4) whether the parties are amenable to process in that proceeding. *Id.* at 283.

\* \* \* \*

. . . First, the U.A.E. courts assumed jurisdiction over this matter prior to this court. Hopkins never objected to the U.A.E. court's jurisdiction and has participated in the proceedings there. Hopkins' participation, however, reflects its misgivings relating to the U.A.E. judicial system. Most significantly, Hopkins did not participate in the suit until it was at risk of having a default judgment imposed against it. Thus, its participation may not be relied upon, as Al Reem does, to suggest that Hopkins embraced the U.A.E. court's jurisdiction.

Second, the federal forum is obviously more convenient for Hopkins and the individuals who represented Hopkins in the formation of the business relationship with Al Reem. . . . The court finds that the forum is not inconvenient for Al Reem, particularly in light of the frequent trips taken by Al Reem representatives to the United States and the evidence presented that Manar Zarroug owns a residence in California. . . .

Third, the Fourth Circuit has held that for a court to abstain to avoid piecemeal litigation, "retention of jurisdiction must create the possibility of inefficiencies and inconsistent results beyond those inherent in parallel litigation, or the litigation must be particularly ill suited for resolution in duplicate forums." . . . As there are no particular inefficiencies mentioned by either party beyond those inherent in parallel litigation, abstention is not appropriate on these grounds.

Fourth, the U.A.E. court obtained jurisdiction prior to this court. Hopkins persuasively argues, however, that the U.A.E. court should not be given priority based on the fact that a complaint was filed there first. As the Supreme Court has noted, "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." . . . There has been no judicial action on the forgery issue in the U.A.E. proceeding, and, therefore, there is no obvious reason for this court to cede its jurisdiction.

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Fifth, the conflicts of laws rules applied in this court are those that prevail in Maryland's state courts. . . . Maryland applies the law of the place where the contract was made. . . . A contract is "considered to be made" where the last act necessary for the formation of a binding contract is performed." . . . The undisputed contract, the 1999 BDA, was notarized in Washington, D.C. on March 3, 1999. Thus, D.C. law applies to the business relationship, making this court a more suitable forum as it is more familiar with D.C. law.

Finally, this court is not convinced that the U.A.E. proceedings are adequate to protect the parties' rights. The U.A.E. court has not even addressed the forgery issue yet; it has spent almost two years assessing the damages incurred by Al Reem. When it does consider the evidence relating to the alleged forgery of the 1998 BDA, the relevant documents will be translated into Arabic. Though an American court would readily spot the grammatical and other differences between those portions of the 1998 BDA and the rest of the documents between Al Reem and Hopkins, the significance of that bad grammar and writing may be overlooked in the translation. Even if Hopkins' U.A.E. attorneys could explain the grammatical and other problems with the text, the analysis would be easier for a native English speaker to perform. Moreover, given that the Zarrougs and Osias, the main Al Reem witnesses, all speak English, the language barrier will not be as great in this court.

\* \* \* \*

[As to Al Reem's request for] a stay of this proceeding until after a final judgment has been reached in the U.A.E. courts[. . . [t]he general rule is for federal courts to "exercise jurisdiction concurrently with a foreign court until a judgment is reached which may be pled as *res judicata* or collateral estoppel in the other forum." . . .

This court is loathe to issue a stay, particularly because of the delay in the U.A.E. court and its failure to address Hopkins' forgery concerns. The court finds it curious that the U.A.E. court is determining damages before it has considered whether Hopkins is, in fact, liable. In addition, if this court issues a stay and Hopkins receives an erroneous judgment against it in the U.A.E., Al Reem has vowed to use that judgment in courts in other locations.

\* \* \* \*

(2) *Mujica v. Occidental Petroleum Corp.*

In *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1134 (C.D. Ca. 2005), the court denied motions to dismiss claims alleging violations of the Alien Tort Statute, 28 U.S.C. § 1350, and Torture Victim Protection Act, 28 U.S.C. § 1350 note, as well as state law claims. The facts of the case and discussion of another opinion issued on the same date are provided in Chapter 6.H.5.a.(5); see also *Digest 2004* at 376-80 concerning the U.S. Supplemental Statement of Interest filed on December 30, 2004, stating that the United States “oppose[d] the pursuit of the instant litigation since it would severely impact this country’s diplomatic relationship with Colombia.”

In this opinion, the court denied motions to dismiss based on international abstention and *forum non conveniens*. Excerpts below provide the court’s analysis in denying the motion on international abstention (footnotes omitted). The *forum non conveniens* issue is discussed in D.2. below.

\* \* \* \*

... [T]he Ninth Circuit has held that ‘the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of a stay.’ *Intel Corp v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993). While the instant case involves a Colombian judgment instead of a state court, the disposition of the Colombian proceeding would not resolve this action because Defendant is not a party to that foreign action. . . .

\* \* \* \*

. . . Similar to *Intel*, the resolution of the foreign proceeding would not conclusively resolve the claims brought by Plaintiffs in this Court. If the Colombian judgment is reversed on appeal, finding, for example, that the Santo Domingo bombing never occurred then the present case against Defendants would be moot. However, if the Colombian judgment was affirmed in all respects, one would imagine that Plaintiffs could pursue the instant action without forc-

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ing this Court to reach any conclusions inconsistent with the Colombian judiciary. Therefore, the Court may not dismiss or stay Plaintiffs' case due to the existence of a foreign parallel proceeding.

\* \* \* \*

4. Retrospective vs. prospective application of the doctrine of international comity

Defendant principally argues that international comity should apply on the basis of the Eleventh Circuit's decision in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). . . . Specifically, Defendant argues that while Plaintiffs may be correct about a retrospective application of the doctrine, this suit should be dismissed on a prospective application of international comity. . . .

"When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings." *Ungaro-Benages*, 379 F.3d at 1238. "When applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id.* "Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id.*

\* \* \* \*

a. The strength of the United States' interest

The United States has a substantial interest in the present case. A Supplemental Statement of Interest of the United States was recently filed by the State Department on December 30, 2004.

The Supplemental Statement relevantly states the following:

The Department believes that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly. An important part of our foreign

policy is to encourage other countries to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses. Duplicative proceedings in U.S. courts second-guessing the actions of the Colombian government and its military officials and the findings of Colombian courts, and which have at least the potential for reaching disparate conclusions, may be seen as unwarranted and intrusive to the Colombian government. Moreover, it may also be perceived that the U.S. Government does not recognize the legitimacy of Colombian judicial institutions. These perceptions could potentially have negative consequences for our bilateral relationship with the Colombian government.

\* \* \* \*

The Supplemental Statement filed by the State Department in this case is . . . strong evidence that the United States, in the interest of preserving its diplomatic relationship with Colombia, prefers that the instant case be handled exclusively by the Colombian justice system. . . .

However, the Court notes that the instant case involves a different circumstance than *Ungaro-Benages*. In *Ungaro-Benages*, the Eleventh Circuit examined a situation in which the President of the United States negotiated the Foundation Agreement with the government of Germany to establish an alternative forum for the sole purpose of handling reparations claims arising out of the Nazi regime. The Foundation Agreement (and the Statements of Interest filed pursuant to that Agreement) “vividly demonstrate that a commitment has been made by the Executive branch to resolve claims on an intergovernmental level.” *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d at 388. . . . While this Court still finds that the United States has a substantial interest in this case, the Court does [not] believe that this interest is as significant as the American interest in the Foundation Agreement.

b. The strength of Colombia’s interest

Attached to the Supplemental Statement of Interest, the State Department has forwarded a letter from the Colombian Ministry of Foreign Relations regarding this litigation. The translation of the

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March 12, 2004 letter states simply: “The Ministry of Foreign Affairs wishes to add that the Government of Colombia is of the opinion that any decision in this case may affect the relations between Colombia and the US.”

While the Colombian government provided little explanation as to why this is true for this particular case, the Court does not believe the Colombian government has to explain itself to a federal court. Thus, the Court finds that Colombia has a strong interest in preventing this Court’s jurisdiction over the instant case.

However, the Court holds that the strength of Colombia’s interest is less than has been found in other cases addressing international comity. . . .

### c. Adequacy of the alternative forum

\* \* \* \*

As the Court has previously held in its *forum non conveniens* analysis that the alternative forum is inadequate, the Court also DENIES Defendant’s motion to dismiss on the basis of international comity. While the United States and Colombia have strong interests in this case, the Court cannot dismiss Plaintiffs’ case without the knowledge that Plaintiffs have an alternative forum in which they are able to obtain a remedy.

### (3) *Presbyterian Church of Sudan v. Talisman Energy*

As discussed in Chapter 6.H.5.a.(1), in 2005 the District Court for the Southern District of New York dismissed two motions for judgment on the pleadings brought by defendant Talisman in *Presbyterian Church of Sudan v. Talisman Energy*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) and 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 31, 2005). The motion in the latter case was based in part on the doctrine of international comity. As noted in Chapter 6, the court had previously rejected a motion for dismissal on that ground, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), and thus, in this action, it was “necessary only to address whether [a Statement of Interest filed by the United States in March 2005 and its attachments] alters those prior conclusions.” The Statement of Interest (“State-

ment”) attached a letter from the U.S. Department of State Legal Adviser William H. Taft, IV, dated February 11, 2005 (“State Letter”), excerpted in Chapter 6, and a diplomatic note from Canada, dated January 14, 2005 (“Canada Letter”). The court denied defendant’s motion, as excerpted below.

\* \* \* \*

Talisman contends that the Statement demonstrates that this action frustrates Canada’s policies towards Sudan in three ways and therefore warrants dismissal as a matter of international comity. First, Talisman argues that Canada adopted a policy of constructive engagement towards Sudan in 1999 and encouraged Talisman to invest in Sudan, which requires this Court to sit in judgment of past Canadian executive policy. Second, Talisman argues that this action creates a chilling effect for future Canadian investment in Sudan, and therefore interferes with Canada’s policy, as expressed in the Canada Letter, of using the prospect of future trade as an inducement for Sudan to resolve its disputes peacefully. Third, Talisman contends that this Court should invoke the doctrine of international comity because Canadian courts can adjudicate this action.

\* \* \* \*

. . . [T]he claims here involve knowing assistance in the commission of grave human rights abuses, including jointly planning attacks on civilians and supporting and facilitating those attacks. Therefore, this action does not require a judgment that Canada’s executive policy of constructive engagement was or caused a violation of the law of nations; it merely requires a judgment as to whether Talisman acted outside the bounds of customary international law while doing business in Sudan.

In any event, the Canada Letter does not argue that Talisman’s presence in the Sudan was pursuant to Canadian government policy or that this lawsuit requires a judgment to be rendered about any past Canadian policy. The State Letter explicitly denies any view as to the merits of this lawsuit. For each of these reasons, Talisman’s first argument is rejected.

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Talisman's second argument is that the existence of this lawsuit interferes with Canada's policy of using the prospect of future trade as an inducement for Sudan to resolve its disputes peacefully by chilling future Canadian investment in Sudan. This argument is firmly rooted in the Canada Letter, which predicted that Canadian firms "will likely absent themselves from Sudan and therefore not contribute to its economic revitalization out of fear of US courts."

\* \* \* \*

The Canada Letter explains that Canada has promised to restore trade support services in the event that the peace process is sufficiently successful in the Sudan, and that this is part of a "stick and carrot" approach to encouraging peace. That promise implies that, should Canada make a judgment that the Sudan is not experiencing genocide or crimes against humanity on the scale alleged in this lawsuit, it will reinstate trade support services. The trade support services, as described in the Canada Letter, appear to be for the benefit of Canadian companies exporting to the Sudan and doing business with Sudanese companies.

While this Court may not question either the accuracy of the description of Canada's foreign policy in its Letter, or the wisdom and effectiveness of that foreign policy, it remains appropriate to consider the degree to which that articulated foreign policy applies to this litigation. As the Supreme Court has explained, deference is appropriate to the extent that a sovereign's opinion has been stated with particularity, that is, regarding "particular petitioners in connection with their alleged conduct." . . . This lawsuit does not concern a Canadian company exporting to and engaged in trade with the Sudan, but a Canadian company operating in the Sudan as an oil exploration and extraction business. Moreover, the allegations in this lawsuit concern participation in genocide and crimes against humanity, not trading activity. While there is no requirement that a government's letter must support its position with detailed argument, where the contents of the letter suggest a lack of understanding about the nature of the claims in the ATS litigation, a court may take that into account in assessing the concerns expressed in the letter. Given the commitment by the United States to the Sudan peace process, it is telling that the United States has not advised this Court



that the continuation of this lawsuit will adversely affect the Government's relations with Canada or threaten the goal of achieving peace in Sudan. In other cases, the United States Department of State has not hesitated to warn courts where it believes continuation of a lawsuit will affect a foreign government's policy to the extent that it would disturb U.S. relations with that foreign government or would adversely affect U.S. efforts to promote peace. . . .

\* \* \* \*

Finally, the United States and the international community retain a compelling interest in the application of the international law proscribing atrocities such as genocide and crimes against humanity. To the extent that the Canada Letter and Talisman's arguments request this Court in its discretion to decline to exercise its jurisdiction over past events in order to avoid conflict with future Canadian foreign policy, the seriousness of the alleged past events counsel in favor of exercising jurisdiction. . . .

In sum, while a court may decline to hear a lawsuit that may interfere with a State's foreign policy, particularly when that foreign policy is designed to promote peace and reduce suffering, dismissal is only warranted as a matter of international comity where the nexus between the lawsuit and that foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit. Even giving substantial deference to the Canada Letter, Talisman has not shown that dismissal of this action is appropriate.

Talisman's third argument, that international comity should be granted because Canadian courts can adjudicate this action, is not based on the Canada Letter, but rather the Statement's indication that it is the Government's "understanding that Canada's judiciary is equipped to consider claims such as those raised here." In some circumstances, comity may be an appropriate response to foreign judicial acts, see *Presbyterian Church*, 244 F. Supp. 2d at 342, but it is not clear that comity is an appropriate response merely to the existence of overlapping jurisdictions. Talisman has provided no legal authority for the notion that deference should be granted because a foreign court also could entertain a lawsuit on the same subject matter. Moreover, even if comity were appropriate where foreign

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courts could hear an action, this Court has already noted that Canadian courts are not able to entertain civil suits for violations of the law of nations. . . .

\* \* \* \*

### (4) *McGraw-Hill Co., Inc. v. Ingenium*

In *McGraw-Hill Co., Inc. v. Ingenium*, 375 F.Supp.2d 252 (S.D.N.Y. 2005), the district court denied a motion by defendant, Ingenium Technologies Corporation, incorporated under the laws of British Columbia, Canada, to dismiss the U.S. plaintiff's claims against it based on international comity. On March 28, 2000, the parties had entered an agreement under which McGraw-Hill agreed to promote software created by Ingenium that allowed customers of computerized data services to search and manage data. The parties' agreement was due to expire on June 30, 2005; they disagreed regarding their respective contractual obligations, whether Ingenium had a protected interest in the software's customer base, and who owned the various intellectual properties involved.

On January 17, 2005, Ingenium filed suit in British Columbia alleging breach of contract and seeking money damages, a declaration of Ingenium's intellectual property rights, and injunctive relief. On February 15, 2005, McGraw-Hill filed an action in the Southern District of New York alleging, *inter alia*, breach of contract and trademark and copyright infringement, and seeking injunctive relief. Both the British Columbia court and the U.S. district court denied the parties' respective motions for injunctive relief. The U.S. court denied Ingenium's motion to dismiss and abstain in favor of its first-filed case in British Columbia, as excerpted below.

\* \* \* \*

. . . While several of the factors favoring abstention are present here, notably the identity of the parties and the overlap of certain of the breach of contract claims, a very significant part of the instant lawsuit centers on plaintiff's claims that defendant has infringed, or

is about to infringe, plaintiff's United States copyrights and trademarks, and serious doubts have been raised about the ability of the British Columbian court to adjudicate these claims in ways that would avoid re-litigation here. Indeed, it is well-established that "decisions of foreign courts concerning the respective trademark rights of the parties are irrelevant and inadmissible" in United States courts hearing Lanham Act claims. . . . Furthermore, a significant part of the relief sought by both sides with respect to the trademark and copyright disputes is injunctive relief, and the British Columbian court has already expressed doubts about its authority to restrain McGraw-Hill's behavior, which largely is unconnected with Canada. . . . Under these circumstances, it would be inappropriate for this Court, the only court with clear authority to hear the case and to grant full relief both before and after trial, to abstain in favor of a potentially inadequate alternative forum.

Second, given the absence of an adequate alternative forum, defendant's motion to dismiss on the ground of forum non conveniens is likewise denied.

Third, defendant's motion to dismiss on grounds of international comity must likewise fail, not only because of the absence of an adequate alternative forum, but also because this simple commercial dispute does not implicate the primary concern of the comity doctrine, which is avoiding entangling United States courts in international relations.

\* \* \* \*

(5) *Royal and Sun Alliance Co. of Canada v. Century International Arms, Inc.*

Conversely, in *Royal and Sun Alliance Co. of Canada v. Century International Arms, Inc.*, 2005 U.S. Dist. LEXIS 18562 (S.D.N.Y. Aug. 26, 2005), the district court granted defendants' motion to dismiss based on a request for a comity-based abstention in deference to a parallel Canadian action. In that case, Royal and Sun Alliance Insurance Company of Canada ("RSA"), a Canadian insurer corporation with its principal place of business in Toronto, Ontario, brought suit against defendants Century International Arms, Inc. and Century Arms, Inc., both

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Vermont corporations. RSA sought reimbursement of expenses and deductibles in connection with lawsuits against defendants that RSA had defended, negotiated and settled as defendants' insurer.

RSA had previously brought suit in Superior Court, Province of Quebec, District of Montreal, Canada, against Century Ltd., a non-party in the U.S. proceeding, seeking payment of the same expenses and deductibles. In response, Century Ltd. claimed that the other Century entities, and not itself, were liable for such monies due to RSA. RSA asserted that Century Ltd.'s claims compelled it to bring suit against the two defendants in the U.S. action.

Excerpts from the court's analysis in granting the motion to dismiss follow.

\* \* \* \*

As an initial matter, Defendants have stated that both Defendants Century International Arms, Inc. and Century Arms, Inc. "consent to the jurisdiction of the Superior Court, Province of Quebec, District of Montreal, Canada where there is a prior action pending, for the purposes of that litigation only." . . .

Contrary to Defendants' assertions, the Parties in both the Canadian action and the action before this Court are not identical. Defendants are not named in the Canadian litigation, filed well over six years ago. Only RSA is a party to both this action and the Canadian suit. However, contrary to RSA's assertions, Defendants and Century Ltd. have not made contradictory claims about their affiliation. In its Defense filed in the Canadian litigation, Century Ltd. stated that it is a separate entity for the purposes of determining liability under the Policies. This is not inconsistent with Defendants' statement that they are affiliates of non-party Century Ltd. All three companies were listed as insureds on the Policies and it appears that there is a question of which company, or all are liable for the reimbursement for services and settlement provided by RSA, in which case, adjudication of these claims in the Canadian court would ensure judicial efficiency and avoid inconsistent results.

Courts in the United States have regularly deferred to Canadian courts. “Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of procedural safeguards of Canadian proceedings.” *Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y. 1979) (internal quotation and citations omitted). Furthermore, it is clear that RSA would have an adequate remedy in Canadian law since they have brought virtually the same claims and demands against Century Ltd. in the Canadian action.

Accordingly, because there is a prior pending action in Canada, and because Defendants have consented to the jurisdiction of the Canadian court, the Court finds that dismissal of this case is warranted.

***b. Anti-suit injunctions***

**(1) *Avipro Finance Ltd. v. Cameroon Airlines***

In *Avipro Finance Ltd. v. Cameroon Airlines*, 2005 U.S. Dist. LEXIS 11117 (S.D.N.Y. June 8, 2005), the district court granted a motion enjoining Cameroon Airlines from proceeding with a pending lawsuit in Cameroon. Plaintiff Avipro Finance Ltd. (“Avipro”), entered into a finance lease agreement with Cameroon Airlines (“CA”) that included an arbitration clause. Avipro filed a motion to compel arbitration and for an anti-suit injunction to enjoin defendant CA from proceeding with a pending lawsuit in Cameroon regarding the same agreement. The court concluded that Avipro’s uncontested evidence resolved in its favor the one remaining disputed issue of material fact regarding possible forgery of the agreement. Excerpts below explain the court’s decision to enjoin CA from proceeding with the pending Cameroon action.

\* \* \* \*

An anti-suit injunction enjoining a party from pursuing a parallel litigation in a foreign forum “may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.” . . . . If both threshold requirements are met, “then the

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party seeking the injunction must show either that the ‘foreign action threatens the jurisdiction of the enjoining forum’ or that ‘the strong public policies of the enjoining forum are threatened by the foreign action.’” . . . . Courts have also concluded that a more lenient standard should be applied in cases like this one, where the domestic court has already decided the merits, reasoning that in such cases “comity considerations are less strong.” . . . .

The Court finds that, although the more lenient standard may be applied here because the Court has already decided the merits, SG Avipro has demonstrated that the requirements for enjoining the parties from proceeding in the Cameroon Action are satisfied even under the stricter standard that applies before the merits have been decided. Although the parties named in both actions are not identical, they are sufficiently similar to satisfy the first threshold requirement because the uncontroverted evidence of record demonstrates that the real parties in interest are the same in both actions. . . .

The second threshold requirement is satisfied because resolution of the issues brought before the Court in the instant action (whether the June 25, 2002, Finance Lease Agreement that includes the arbitration clause is a validly executed agreement requiring the parties to arbitrate their underlying disputes or whether the agreement is void because it is a forgery or the product of some other type of fraud, and whether CA is obliged to arbitrate any other issues concerning the contract) is dispositive of the Cameroon Action in which CA seeks a decree that the June 25, 2002, Finance Lease Agreement is void. In the Cameroon Action, CA makes similar, if not identical, arguments to those it makes in the instant case. . . .

The Court finds unpersuasive CA’s argument that resolution of the instant action is not dispositive of the Cameroon Action because the issues to be decided in the two actions are not precisely the same given that CA seeks a decree in the Cameroon Action that the agreement is void under Cameroon law, while the issue of the validity of the agreement turns on federal substantive law in the instant action. Irrespective of choice of law, the parties’ dispute as to the validity of the June 25, 2002, Finance Lease Agreement has been placed before the courts in both the domestic and foreign forums.

Finally, the Court finds that the enjoining forum’s strong public policy in favor of arbitration, particularly in international disputes,

... , would be threatened if CA were permitted to continue to pursue the Cameroon Action, particularly in light of the Court's decision herein granting SG Avipro's motion to compel arbitration.

Accordingly, for the foregoing reasons, SG Avipro's motion for an anti-suit injunction is granted. CA and all those working in concert with it are hereby permanently enjoined from maintaining or further pursuing the Cameroon Action.

\* \* \* \*

(2) *Ibeto Petrochemical Industries, Ltd. v. Beffen*

In *Ibeto Petrochemical Industries, Ltd. v. Beffen*, 412 F. Supp. 2d 285 (S.D.N.Y. 2005), the district court issued an anti-suit injunction barring plaintiff from pursuing a pending suit in Nigeria. Plaintiff, Ibeto Petrochemical Industries ("Ibeto"), entered into a vessel charter, which contained an arbitration clause, under which Beffen agreed to ship base oil to plaintiff from New Jersey to Nigeria. When the oil allegedly arrived contaminated, Ibeto simultaneously filed suit in the Southern District of New York and notified defendants that it was initiating arbitration proceedings in London. Ibeto also filed suit on the same claim in Nigeria. It then notified defendants that it was closing the arbitration and intended to pursue the Nigerian litigation, and moved for a voluntary dismissal of the pending New York case. Defendants moved to dismiss with prejudice or stay the New York suit in favor of arbitration in London and to enjoin Ibeto from pursuing its litigation in Nigeria. In the alternative, defendants moved for a declaration "limiting any recovery by plaintiff to \$500 pursuant to the compulsorily applicable COGSA [Carriage of Goods by Sea Act, 46 U.S.C. Appx. § 1300-1315] liability limitation." After determining that a valid arbitration clause existed between the parties and that the plaintiff's claim against defendant was within the scope of the clause, the court issued an order compelling arbitration in London and enjoining the plaintiff from litigating in Nigeria.

Excerpts follow from the court's analysis of the anti-suit injunction (footnotes omitted).

\* \* \* \*

... While this Court has the power to issue an anti-suit injunction, ... it should only do so if “(A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined.” Both of these requirements are met in this case: the same parties are involved in both this case and in the Nigerian case, and resolution of this case (through arbitration) will be dispositive of the Nigerian matter.

Once these threshold considerations have been met, the Court must address the five *China Trade [ Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987)] factors. ... Several of these factors are applicable here. First, plaintiff’s intention to pursue litigation in this foreign forum as an alternative to arbitration is a “salient consideration in this case ... given the federal policy favoring the liberal enforcement of arbitration clauses.” ... Permitting the Nigerian litigation to continue may frustrate the general federal policy of promoting arbitration. *Second*, while pursuit of parallel cases is not prima facie evidence of vexatiousness, the fact that the Nigerian court will not apply the principles of COGSA may result in widely disparate results in these two actions. This potential disparity, and the race to judgment that it could provoke, weigh in favor of an anti-suit injunction. *Third*, equitable considerations involved, such as deterring forum shopping, also compel enjoining the foreign action. *Fourth*, it is likely that adjudication of the same issues in two separate actions would result in inconvenience, inconsistency, and a possible race to judgement. As discussed above, given that COGSA may be applicable in the London arbitration but not in the Nigerian action, the outcomes could be inconsistent. Also, because the witnesses and evidence in both actions would likely be the same, there could be considerable inconvenience in shuttling witnesses between the venues for these two actions. With regard to the last issue—threat to jurisdiction—neither action is strongly favored, as both courts have in personam jurisdiction over the parties. However, given that the four other *China Trade* factors are met, defendants’ motion to enjoin the Nigerian action is granted.

\* \* \* \*



## 2. Forum Non Conveniens

### (1) Norex Petroleum Limited v. Access Industries, Inc.

In *Norex Petroleum Limited v. Access Industries, Inc.*, 416 F.3d 146 (2nd Cir. 2005), the Second Circuit reversed a district court dismissal of plaintiff's claims on *forum non conveniens* grounds. As explained by the court:

During the 1990s, Norex [Petroleum Limited, a Cypriot corporation with its principal place of business in Canada] acquired a 60% interest in [a Russian oil company, ZAO Corporation] Yugraneft, with the remaining 40% owned by another Russian oil company, OAO Chernogorneft. Norex alleges that, by the end of the decade, defendants had hatched a scheme to take over Yugraneft by means of various RICO predicate acts of mail and wire fraud, extortion, interstate and foreign travel in aid of racketeering enterprises, and money laundering. *See* 18 U.S.C. §§ 1961(1)(B), 1962. While many of these predicate acts allegedly occurred entirely in Russia, others involved wiring money through United States banks to bribe officials in Russia, to buy corporate assets in Russia, or to hide the profits of allegedly illegal activities in Russia. In its brief before this court, Norex asserts that defendants "resident in the S.D.N.Y. masterminded and controlled the scheme out of that district."

Defendants in the case include Yugraneft and numerous U.S. and foreign companies, four U.S. citizens and one permanent resident of the United States.

On several occasions during 1999-2001, an official of Tyumen Oil Company ("TNK"), a Russian company that by then controlled Chernogorneft, allegedly demanded that Yugraneft forgive certain oil debts, ultimately threatening that TNK would take over Yugraneft and stating that "any litigation to challenge such a takeover would prove futile" because TNK "'controlled' Russia's Supreme Arbitration Court." Litigation did ensue, including "a lawsuit filed by TNK in Siberia on June 25, 2001, seeking to invalidate a large portion of Norex's eq-

uity interest in Yugraneft on the ground that Norex's capital contribution in the form of 'know how' had been improperly valued. Norex insists that it was never properly served in this action, which the parties refer to as the 'Know-How Case.'"

Following a series of events involving alleged court corruption and intimidation and other fraudulent acts, in January 2002 the Russian court entered a default judgment against Norex in the Know-How Case, reducing its equity interest in Yugraneft to 20%. Norex brought suit in the U.S. District Court for the Southern District of New York in February 2002. The district court granted defendant's motion to dismiss on grounds of *forum non conveniens*. 304 F. Supp. 2d 570 (S.D.N.Y. 2004).

According to the Second Circuit, both parties "apparently agree that the adverse decision in the Know-How Case now effectively bars Norex from challenging the legality of TNK's takeover of Yugraneft in a Russian court, preventing its present pursuit in Russia of the disputed issues that are at the core of its Southern District complaint."

Excerpts below explain the court of appeals' reversal of the district court, finding errors of law in the first two steps of the *forum non conveniens* analysis and remanding for further proceedings consistent with its opinion (footnotes omitted)

\* \* \* \*

#### 1. Determining the Degree of Deference Due a Plaintiff's Choice of Forum: *Iragorri's* Sliding-Scale Analysis

At the first step of *forum non conveniens* analysis, the district court in this case concluded that Norex's choice of a United States forum was "entitled to less than substantial deference." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d at 576. The court noted that Norex was not a United States resident, and its choice of a New York forum was, therefore, "not presumptively the most convenient one for it." *Id.* At the same time, however, the court credited Norex's "representation that the United States is a more convenient forum for a Canadian citizen than is Russia," defendants' preferred forum, "based on geographic proximity." *Id.*

This analysis raises a legal concern: the district court appears to have given controlling weight to the identified adverse presumption without the comparative analysis of convenience and forum shopping appropriate to determine the deference due Norex's choice of a New York forum on the flexible sliding scale approved by this court in *Iragorri v. United Technologies Corp.*, 274 F.3d at 71-72.

Any review of a forum non conveniens motion starts with "a strong presumption in favor of the plaintiff's choice of forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). . . .

\* \* \* \*

To facilitate review [of the totality of circumstances supporting a plaintiff's choice of forum], *Iragorri* identified factors frequently relevant to determining whether a forum choice was likely motivated by genuine convenience: "[1] the convenience of the plaintiff's residence in relation to the chosen forum, [2] the availability of witnesses or evidence to the forum district, [3] the defendant's amenability to suit in the forum district, [4] the availability of appropriate legal assistance, and [5] other reasons relating to convenience or expense." *Id.* at 72. Circumstances generally indicative of forum shopping, that is, plaintiff's pursuit not simply of justice but of "justice blended with some harassment," *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 507, include "[1] attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [2] the habitual generosity of juries in the United States or in the forum district, [3] the plaintiff's popularity or the defendant's unpopularity in the region, or [4] the inconvenience and expense to the defendant resulting from litigation in that forum." *Iragorri v. United Techs. Corp.*, 274 F.3d at 72[.] . . .

Preliminary to discussing the *Iragorri* convenience factors that find record support in this case, we note that the district court did not ascribe any forum-shopping motives to Norex's choice of a New York forum. Of course, even when a foreign plaintiff's decision to sue in the United States is not obviously informed by forum shopping, there may be "little reason to assume that it is convenient" for the plaintiff. *Iragorri v. United Techs. Corp.*, 274 F.3d at 71. In any event, we recognize that the possibility of a RICO treble

damages award might have made the choice of a United States forum attractive to Norex regardless of convenience. . . .

Nevertheless, the record also reveals a number of circumstances demonstrating that genuine convenience did inform Norex's choice of a New York forum. Notably, it appears doubtful from the record that Norex could have perfected jurisdiction over all defendants in either of its presumptively convenient home forums, Canada or Cyprus, or even in defendants' preferred forum, Russia. Thus, Norex's decision to litigate in New York, where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed its decision to sue outside its home forum. . . .

. . . [T]he undisputed fact that witnesses and evidence will be more easily available to all parties in New York than in either of Norex's home forums also supports according deference to plaintiff's choice. To the extent the district court considered witness availability as between the chosen New York forum and defendants' proposed alternative, Russia, it did so at the third step of forum non conveniens analysis in light of its conclusion that Russia has a greater interest in the subject matter of this dispute than the United States. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d at 580-81. . . . We do not here suggest that the district court's identification, at the final step of forum non conveniens analysis, of a superior Russian public interest in the subject of this case falls outside its discretion. It does not. But at the first step of analysis, the issue is not whether witnesses and evidence are unavailable in the defendant's preferred forum, but whether they are more available in plaintiff's chosen foreign forum than in its home forum. If, as in this case, the answer to that question is yes, then it appears likely that convenience rather than forum shopping influenced the plaintiff's choice of a foreign forum, further supporting significant deference on the *Iragorri* sliding scale.

\* \* \* \*

## 2. Adequate Alternative Forum

\* \* \* \*

To secure dismissal of an action on grounds of forum non conveniens, a movant must demonstrate the availability of an adequate alternative forum. . . .

“An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute.” . . . In urging Russia as an adequate alternative forum for Norex’s claims, defendants satisfied the first prong of this test by representing that they would all submit to the jurisdiction of Russian courts in any comparable action filed against them by plaintiff. . . . Accordingly, Norex’s challenge on this appeal focuses on the second prong of the test: whether Russian courts would, in fact, permit litigation of the disputed issues at the core of Norex’s RICO complaint.

\* \* \* \*

. . . Norex does not dispute that Russian law recognizes [similar] causes of action or forms of compensation. Instead, it submits that these alternative actions are not practically available to it at present because the factual crux of any fraud or conspiracy claims that it would pursue in Russia would necessarily be based—like Norex’s pending RICO action—on the illegality of defendants’ actions in depriving Norex of its controlling equity interest in Yugraneft. Norex asserts that Russian courts would deem this issue precluded by the default judgment entered against it in the Know-How Case.

Accepting Norex’s preclusion argument, the district court nevertheless concluded that Russia was an adequate alternative forum because Norex could have litigated its claims in that jurisdiction if it had not let the opportunity to do so lapse. The court noted that Norex, which was aware of the Know-How Case while it was pending, could have sought to litigate the merits of that action. Instead, “contending that it was not served properly with process[, Norex] declined to participate in those proceedings even to contest the court’s jurisdiction, and allowed the time periods for normal appeals and collateral attack to lapse before filing the instant case in this District.” *Id.* at 578. The district court further observed that “to the extent Plaintiff’s claims are barred in Russian courts, they are likewise barred here since this Court would also owe deference

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to the Russian court decision unless it is shown that the decision was rendered in a way that violated fundamental standards of procedural fairness.” *Id.*

Although Norex disputes certain factual assumptions underlying these conclusions, we focus only on a legal concern raised by the district court’s forum non conveniens analysis: it appears that the district court did not, in fact, find a presently available Russian forum for Norex to pursue its claims against the defendants; rather it found the lack of such a forum excusable in light of Norex’s own conduct. We here clarify that a case cannot be dismissed on grounds of forum non conveniens unless there is presently available to the plaintiff an alternative forum that will permit it to litigate the subject matter of its dispute. It may well be that a plaintiff that is precluded from litigating a matter in a foreign jurisdiction because of an adverse earlier judgment by its courts will not be able to pursue the claim further in the United States, but the reason for dismissal in such circumstances is our recognition of the foreign judgment in the interest of international comity, not forum non conveniens. . . .

\* \* \* \*

In this case, defendants failed to demonstrate that Russia affords Norex a presently available forum to litigate the disputed issues underlying its RICO complaint. Expert opinions from both sides reveal that Russian courts would likely deem the core issues underlying plaintiff’s claims largely precluded by the Know-How Case. . . . Although a successful criminal corruption prosecution in Russia in connection with the Know-How Case might restore Norex’s ability to sue defendants in that forum for their alleged damages in connection with the Yugraneft takeover, defendants have not shown that such a prosecution is pending or even likely. Accordingly, this possibility is too remote to support defendants’ burden. . . . In this case, the district court did not condition its forum non conveniens dismissal on Russia affording Norex some forum for litigation of its claims against defendants. Presumably, this was because the court realistically recognized that the record admits no such likely possibility. Under such circumstances, to base an adequate alternative forum determination on foreclosed past

claims or remote future ones misperceives the defendant's burden at the second step of forum non conveniens analysis: to demonstrate a presently available alternative forum in which plaintiff can litigate its claim.

\* \* \* \*

C. Before Recognizing the Russian Default Judgment in the Know-How Case as a Ground for Dismissal of the Pending RICO Action, the District Court Must Afford Norex a Hearing on its Personal Jurisdiction Challenge to that Judgment

\* \* \* \*

The propriety of one court reviewing the proper exercise of jurisdiction by another before giving preclusive effect to a default judgment entered by the latter cannot be question[ed]. . . .

In this case, Norex vigorously challenges the exercise of personal jurisdiction by the Russian court that entered a default judgment against it in the Know-How Case. Norex insists that it was not properly served through diplomatic channels as required by the legal assistance treaty then in effect between the Republic of Cyprus . . . and the Union of Soviet Socialist Republics. To the extent the Russian Court, in entering the default judgment, found that Norex had been properly served in Cyprus by mail pursuant to Article 10 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters . . . there appears to be a legal issue as to whether this convention had taken effect in Russia at the time of service as well as a factual issue. . . . We express no opinion as to the merits of Norex's jurisdictional challenge. We note only that the district court could not rely on the preclusive effect of the Russian default judgment as a ground for dismissing Norex's RICO complaint without affording plaintiff an opportunity to be heard on its personal jurisdiction challenge to that default judgment. . . .

(2) *Mujica v. Occidental Petroleum Corp.*

Excerpts below from the court's decision in *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal 2005), dis-

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cussed in 1.a.(2) *supra*, and Chapter 6.H.5.a.(5), provide its analysis in concluding, among other things, that Colombia provided an inadequate forum because of its “rules regarding past recovery for the same wrongful act.”

\* \* \* \*

In its supplemental briefing, Defendant argues that Plaintiffs cannot challenge the adequacy of the alternative forum because they had obtained a judgment in Colombia and “Plaintiffs’ recovery in its first action for the same alleged injuries is deemed complete relief.” . . . As support for its argument, Defendant has relied upon the opinion of its expert on Colombian law, Hinestrosa. In his supplemental declaration, Hinestrosa states the following regarding potential recovery against Defendant in Colombia:

Full reparation of damage or loss is a fundamental principle in Colombian law. The victim must be fully indemnified, regardless of who caused the damage or loss, whether it was a single person or many persons, or a government agency or entity or a private party or entity. At the same time, it is a basic principle that the damage or loss can be repaired only one single time, namely that no one can collect and receive indemnification for the same damage or loss several times. . . .

Consequently, if the Council of State upholds the decision of the administrative law court of Arauca, which issued a guilty verdict against the Government, the Ministry of Defense, and ordered that the plaintiffs be paid the amount of damages and losses claimed by them, as evidenced and substantiated during the proceedings, the satisfaction of that obligation will imply the full reparation of the victims, *who may not obtain any other indemnification from other parties.*

While Defendant believes this argument supports a finding that Colombia is an adequate forum, the Court believes that it proves the opposite. Hinestrosa’s opinion is that these Plaintiffs will not be able to recover against these Defendants, even though these Defen-



dants were not parties to the Colombian proceeding, if the existing Colombian ruling is left undisturbed. The unavailability of a remedy is a firmly established ground for finding that the alternative forum is *inadequate*. . . . If Plaintiffs “already have received complete recovery for their injuries through the Colombian court system”, . . . Colombia would be an inadequate forum because Plaintiffs could not obtain a remedy against Defendant as they could in this Court.

The Court imagines Defendant will object this is not an “inadequacy” since it was Plaintiffs’ fault for failing to pursue claims against both the Colombian military and Defendant in a single action. However, the Court bears in mind that it must focus on whether a “practical remedy” exists in the alternative forum, . . . ; not whether it hypothetically exists. . . . [T]he Court finds that Plaintiffs, given the successful nature of their previous litigation, cannot obtain a remedy in Colombia against these Defendants.

\* \* \* \*

(3) *Usha (India), Ltd. v. Honeywell International, Inc.*

In *Usha (India), Ltd. v. Honeywell International, Inc.* 421 F.3d 129 (2nd Cir. 2005), the Second Circuit took the unusual step of affirming but modifying a lower court’s dismissal based on *forum non conveniens*. The plaintiffs are corporations organized and existing under the laws of the Republic of India with principal offices in India; Honeywell is a U.S. corporation. In 1987, Honeywell, under the name Metglas, and Usha India created an Indian-based joint venture UAML, to make and sell amorphous metal products.

When Honeywell notified UAML’s board of its plan to sell Metglas, plaintiffs sued, alleging that the sale of Metglas would involve the sale of assets that Honeywell misappropriated from UAML, including technology, equipment, and trade secrets. All claims arose under the laws of India.

The district court granted defendant’s motion to dismiss on the basis of *forum non conveniens*, finding the New Delhi High Court to be the proper venue to hear plaintiffs’ claims. Addressing concerns raised as to inordinate delays in the In-

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dian courts, the Second Circuit modified the lower court's judgment as explained in excerpts below (footnotes omitted).

\* \* \* \*

... The plaintiffs contend ... that the backlog of cases and continuing congestion [in the New Delhi High Court] will prevent them from obtaining meaningful relief, and that the court is therefore not an adequate forum. They assert that even if that backlog is reduced by a recent increase in the court's amount-in-controversy requirement, it would take ten to fifteen years for the New Delhi High Court to adjudicate their claims. ...

The defendants do not question the plaintiffs' underlying contention that if it would take ten to fifteen years for the New Delhi High Court to reach and decide a vigorously prosecuted action with respect to this dispute, it is an inadequate alternative forum. Instead, they point to their expert's testimony, ... that it would take only two to three years to adjudicate the plaintiffs' claims in the New Delhi High Court based on the timetable provided under recently amended procedural rules. We have our doubts about the value of the defendants' expert testimony on this point. His estimate does not appear fully to take into account the existence of the New Delhi High Court's current backlog—even reduced by the change in the amount-in-controversy requirement—and how the backlog may affect the time it would take for the court to reach and decide this case.

... Based on our analysis of the parties' submissions, we might simply decide that the defendants have failed to meet that burden and that the judgment of the district court ought therefore to be vacated. But we do not think that such a resolution of this appeal is necessary. Nor do we think it would be to the benefit of either party: We think, as the defendants contend, that taking into account both public and private interests—provided only that proceedings in India can be concluded with reasonable dispatch—resolution of the dispute among the parties in India clearly “will be most convenient and will best serve the ends of justice,” *BCCI Overseas*, 273 F.3d at 246 (*quoting Alfadda*, 159 F.3d at 46). We therefore conclude that the district court's final determination

of whether this action should be dismissed with prejudice ought to be postponed for a period of eighteen to twenty-four months. During such time, we expect the plaintiffs to pursue their claims in India, and we anticipate that an answer to whether the defendants have indeed carried their burden that adjudication there will be reasonably prompt and that it is therefore an adequate alternative forum will become substantially more clear.

... We further modify the judgment to make the dismissal contingent upon the defendants' waiving of any statute-of-limitations defense that would bar this case, if promptly hereafter commenced, from being heard in an Indian forum. The case shall be placed on the district court's suspense docket if so dismissed. The dismissal is without prejudice only insofar as the plaintiffs may make the motion referred to above in the district court to reinstate this action no sooner than eighteen months and no later than two years after the date hereof.

On remand, consistent with this opinion, the district court may alter the time limitation stated herein and add any other conditions to bringing such motion that it deems appropriate. In the event that the plaintiffs make a motion to reinstate this action in accordance herewith, the district court shall grant the motion unless the defendants demonstrate to the district court's satisfaction 1) that the plaintiffs have not both promptly brought and vigorously pursued their claims in the New Delhi High Court or some other appropriate Indian court, 2) that the claims are likely to be adjudicated with reasonable dispatch, or 3) that the plaintiffs have not substantially complied with the terms of any additional orders consistent with this opinion that the district court may enter. If the motion is granted, this action shall be restored to the active docket of the district court. If the motion is denied or not brought within the applicable time period, then the district court may dismiss the case with prejudice.

### **3. Gathering Evidence Abroad**

In *Hagenbuch v. 3B6 Sistemi Elettronici*, 2005 U.S. Dist. LEXIS 20049 (N.D. Ill. Sept. 12, 2005), the district court granted plaintiff Leroy Hagenbuch's motion to compel defendants

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3B6 Sistemi Elettronici Industriali S.R.L. (“3B6 Italy”) and 3B6 Technologies, LLC (“3B6 USA”) to produce documents relevant to his patent infringement suit against them. Defendants opposed Hagenbuch’s motion to compel and moved for a protective order. During pretrial discovery, 3B6 Italy, a foreign corporation based in Italy, refused to produce any documents, claiming that all discovery must take place in accordance with the Hague Convention on Taking Evidence Abroad, 23 U.S.T. 2555, TIAS 7444 (“Hague Evidence Convention” or “Hague Convention”). The court rejected defendants’ assertion, stating:

Both the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 522, 533, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987). In *Societe Nationale Industrielle Aerospatiale*, the Supreme Court considered the relationship between the federal discovery rules and the Hague Convention and determined that “the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad.” *Id.* at 536. The Court rejected mandatory resort to the Hague Convention, adopting instead an approach to the Convention that leaves the district courts free to utilize a case by case approach. *Id.* at 546. . . . When making these case by case decisions, district courts are instructed to consider: (1) the intrusiveness of the discovery requests; (2) the sovereign interests involved; and (3) the likelihood that resort to the Hague Convention would be an effective discovery device. *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 544-46. The party moving for application of the Hague Convention bears the “not great” burden of showing that the Convention applies. *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 474 (D. Del. 2003).

As to the first issue, the court held that Hagenbuch’s requests were not overbroad or abusive, and that “while some of plaintiff’s requests are broad, 3B6 Italy’s blanket refusal to

supply any documentation makes it difficult to determine which documents are relevant to Plaintiff's claims and which are not." Excerpts below address the second and third considerations (footnotes omitted).

\* \* \* \*

Defendants argue that the Hague Convention must apply in this case because Italy has a legitimate national interest in preventing pre-trial discovery. Under Article 23 of the Hague Convention, a contracting state may declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. In adopting the Hague Convention, Italy expressly declared, "The Italian Government . . . will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries." 28 U.S.C.A. § 1781.

Italy may have an interest in restricting pre-trial discovery but the United States has an interest in the just, speedy and inexpensive determination of litigation in our courts. *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 542-43. The United States' interest is adversely affected by unnecessary adherence to the Hague Convention, as the Convention's procedures are often long and drawn out and result in less discovery than United States courts consider appropriate. *See* U.S. Dept. of State, U.S. Dept. of State Circular on Hague Evidence Convention Operations, Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, available at [http://www.travel.state.gov/law/info/judicial/judicial\\_689.html](http://www.travel.state.gov/law/info/judicial/judicial_689.html) ("U.S. Dept. of State Circular"). Furthermore, the Court does not recognize Italy's declared desire to limit pre-trial discovery to be an important or compelling sovereign interest, as such an outcome would result in finding an important sovereign interest in every case. . . . Based on the sovereign interests involved in this case, the Court does not find it necessary to resort to the Hague Convention.

#### C. Likelihood That Hague Convention Will Be an Effective Discovery Device

Defendants suggest that the Hague Convention can function as an effective discovery device in this case. Discovery under the

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Hague Convention requires Plaintiff to demonstrate a bona fide need for a specific document and present his requests to Italy's Ministry of Foreign Affairs, which then forwards the request to the appropriate Italian court of appeals. See 28 U.S.C.A. § 1781. Having heard Plaintiff's arguments, the Italian court then determines what discovery is appropriate and how it will proceed. *Id.* Citing *Tulip Computers Int'l B.V.*, 254 F. Supp. 2d at 474-75, Defendants argue that foreign courts should be trusted to make appropriate determinations regarding the discovery necessary for pending litigation. . . .

The Court is not persuaded that discovery in this case will be simple, efficient, or fair under the Hague Convention. As noted above, compliance with the Hague Convention may be difficult and time consuming. See *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 547 n.30. The party seeking discovery may find it difficult to determine what evidence is in the control of the party urging resort to the Convention. *Id.* Furthermore, the process itself requires translating requests into different languages and then processing them in what is often a six to twelve month long process. See U.S. Dept. of State Circular. In addition, Italy has explicitly stated its opposition to pre-trial discovery, placing Plaintiff (with his pre-trial discovery requests) at a significant disadvantage from the outset. Because there are no compelling grounds for proceeding under the Hague Convention instead of the Federal Rules of Civil Procedure, and because the Hague Convention will place a heavy and unfair burden on Plaintiff, the Court finds that the Hague Convention would not be an effective discovery device in this case.

### III. Conclusion

For the reasons discussed above, the Court finds that the Federal Rules of Civil Procedure, and not the Hague Convention, govern discovery in this case. Under the Federal Rules of Civil Procedure, Plaintiff is entitled to discovery from 3B6 Italy and the Court therefore grants Plaintiff's motion to compel discovery and denies Defendants' cross-motion for protective order. . . .

#### 4. Service of Process Abroad

##### a. *Service in suits involving country party to the Hague Service Convention*

###### (1) *By mail and Federal Express*

In 2005 U.S. courts addressed the issue of service by mail and Federal Express pursuant to Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ("Hague Service Convention" or "Hague Convention") and Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 4(f)(2)(C)(ii).\*

(i) In *Fireman's Fund Co. v. Fuji Electric Systems Co.*, 2005 U.S. Dist. LEXIS 4580 (N.D. Ca. Mar. 17, 2005), the court granted a motion to dismiss based on its determination that service on a Japanese corporation in Japan by Federal Express was prohibited by Japanese law. Excerpts below provide the court's analysis of the relationship between the Hague

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\* Fed.R.Civ.P. 4(f) provides as follows in relevant part:

Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual . . . may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or . . .

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

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Convention and Fed.R.Civ.P. 4 and its determination that the service was unlawful because it did not satisfy Rule 4(f)(2)(C)(ii).

\* \* \* \*

### 1. The Hague Convention

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“the Hague Convention”) is a multilateral treaty, formulated in 1964, that applies, between signatory countries, “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99, 100 L. Ed. 2d 722, 108 S. Ct. 2104 (1988). The Hague Convention “was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.” *See id.* As a result, “the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.” *See id.* at 699. Japan and the United States are both signatories to the Hague Convention. . . . Fireman’s Fund’s service upon Fuji Japan thus is controlled by the Hague Convention because the service of process was attempted in Japan. Article 2 of the Hague Convention “requires each state to establish a central authority to receive requests for service of documents from other countries.” *See id.* The Hague Convention, however, also provides that it does not “interfere with” other methods of serving documents in international civil suits. *See* Hague Convention, art. 10.

Specifically, Article 10(a) of the Hague Convention states: “Provided the State of destination does not object, the present Convention shall not interfere with—(a) the freedom to send judicial documents, by postal channels, directly to persons abroad.” *See* Hague Convention, art. 10(a). The Ninth Circuit has held that “the freedom to send judicial documents” pursuant to Article 10(a) includes service of such documents. *See Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004). The Ninth Circuit, in *Brockmeyer*, con-



cluded that Article 10(a) permits and does not interfere with service of process by international mail, provided the receiving country does not object. *See id.* at 803.

Japan has explicitly stated its objection to Articles 10(b) and 10(c), but has not stated any objection to Article 10(a). *See* Hague Convention at n.9(4); *See also Brockmeyer*, 383 F.3d at 803; . . . Consequently, in that Japan has not stated any objection to Article 10(a), service of process by international mail to Japan is allowed under the Hague Convention.

2. Federal Rule of Civil Procedure 4(f)(2)(c): “Service Upon Individuals in a Foreign Country”

The Ninth Circuit has held that because Article 10(a) does not itself affirmatively authorize international mail service, a court “must look outside the Hague Convention for affirmative authorization of the international mail service that is merely not forbidden by Article 10(a).” *See Brockmeyer*, 383 F.3d at 804. Any affirmative authorization of service by international mail, and the requirements thereof, “must come from the law of the forum in which the suit is filed.” *See id.* at 804. Such “[e]xplicit, affirmative authorization for service by international mail is found only in Rule 4(f)(2)(C)(ii).” *See id.* at 804. . . .

Fireman’s Fund’s service of process on Fuji Japan is proper if Fireman’s Fund has fully complied with Rule 4(f)(2)(C)(ii). In that regard, Fireman’s Fund hired Legal Language Services (“LLS”) to effect service upon Fuji Japan. . . . Cara LaForge (“LaForge”), a process server for LLS, attests that she . . . requested that the Clerk serve the documents by Federal Express and that the Clerk [of the Court] effected service on Teiichi Kojima, a general manager at Fuji Japan, via Federal Express. . . .

Additionally, as noted, for Fireman’s Fund’s service of process to be proper, the manner of service (here, Federal Express delivery) must not be “prohibited by the law” of Japan. *See* Fed.R.Civ.Pro. 4(f)(2)(C)(ii). . . . It is undisputed that the law of Japan forbids service of process by Federal Express delivery. . . . Thus, under either line of authority, service by Federal Express was improper under Rule 4(f)(2)(C)(ii).

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Accordingly, Fuji Japan's motion to dismiss will be granted, and Fireman's Fund will be afforded leave to serve Fuji Japan in accordance with the Hague Convention and Rule 4 of the Federal Rules of Civil Procedure.

(ii) In *Papir v. Wurms*, 2005 U.S. Dist. LEXIS 2201 (Feb. 15, 2005), the U.S. District Court for the Southern District of New York held that defendants in Israel could be served by international mail. In December 2001 the bankruptcy trustee for the estate of Benham Gem Company, L.L.C. filed an adversary proceeding in the U.S. Bankruptcy Court for the Southern District of New York against Shalom Papir and S. Papir Diamonds, Ltd., an Israeli citizen and corporation respectively ("Papir"). Marcel R. Wurms, an attorney hired to represent Papir in the bankruptcy proceeding, failed to file an answer, and the court granted the trustee's motion for a default judgment against Papir. Papir then filed this malpractice suit against Wurms.

New York law requires that plaintiffs alleging malpractice show that "but for the breach they would have prevailed in the bankruptcy proceedings." Wurms argued that plaintiffs could not show they would have prevailed in the adversary proceeding if he had timely answered. Papir argued that service upon them in Israel by the bankruptcy trustee via international mail was improper, and therefore, the bankruptcy court did not have personal jurisdiction over them, allowing them to prevail. The court rejected this argument, holding that service by international mail in Israel was proper, and therefore, Papir could not prove they would have prevailed but for Wurms' failure to file. In its opinion, excerpted below (footnotes omitted), the district court followed *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986), noting that because it is located in the Second Circuit, it is not bound by the more recent Ninth Circuit *Brockmeyer* case relied on in *Fireman's Fund*, *supra*. *Brockmeyer* is discussed in *Digest 2004* at 866-70.

\* \* \* \*

Federal Rule of Bankruptcy Procedure 7004(a) controls service of process in adversary proceedings in bankruptcy court and incorporates Federal Rule of Civil Procedure 4. *See* Fed. R. Bankr. P. 7004(a). Rule 4(f) permits service on an individual defendant abroad by “any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.” Fed. R. Civ. P. 4(f)(1). Article 10(a) of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”), Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, to which both the United States and Israel are parties, states, “Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad.” 20 U.S.T. at 363. The Second Circuit has interpreted this provision to permit service on foreign defendants by mail as long as the country in which service is made does not object. *See Ackermann*, 788 F.2d at 838-39. In *Ackermann*, the plaintiffs were German nationals who sought to enforce a judgment rendered in Germany against a U.S. national. *See id.* at 837. The defendant U.S. national resisted, arguing that service in the German suit had been improper because he was served by international first-class mail. *See id.* The Second Circuit disagreed, holding that service by mail was proper under the Hague Convention because the United States had not objected to such service under Article 10(a). *Id.* at 839.

Although Israel did make reservations and declarations when it acceded to the Hague Convention, none of them concerned service by mail under Article 10(a). . . . Israel is also not on the U.S. Department of State’s list of countries that have objected to service by mail under Article 10(a). *See* U.S. Department of State Circular on Operations of the Hague Service Convention, available at [http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://travel.state.gov/law/info/judicial/judicial_686.html). Under *Ackermann*, therefore, service by mail was proper on Papir. Service was similarly proper on Diamonds Ltd. because Federal Rule of Civil Procedure 4(h) also incorporated by Federal Rule of Bankruptcy Procedure 7004(a), permits service on corporations and as-

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sociations in accordance with Rule 4(f), and thus the Hague Convention. *See* Fed. R. Civ. P. 4(h)(2).

The Ninth Circuit has recently observed that there is a difference between affirmatively permitting particular means of service and not prohibiting such means. *See Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004). In *Brockmeyer*, the Ninth Circuit agreed with the *Ackermann* court that the Hague Convention permits service by mail on defendants in countries that have not objected under Article 10(a). *Id.* at 802. However, in the Ninth Circuit's view that was only half the battle: "Article 10(a) does not itself affirmatively authorize international mail service. . . . We must look outside the Hague Convention for affirmative authorization of the international mail service that is merely not forbidden by Article 10(a)." *Id.* at 804. The court then examined Federal Rule of Civil Procedure 4(f) and found that no provision authorized international service by ordinary mail without prior court approval. *See id.* at 803-08. Service by first-class mail was not proper because, although not forbidden by the Hague Convention, it was not authorized by Federal Rule of Civil Procedure 4(f). *Id.* at 808-09.

*Ackermann* is the law of this Circuit and forecloses reliance on *Brockmeyer*. In *Ackermann*, the Second Circuit held that service by mail under Article 10(a) was an alternative method of service approved by the Hague Convention. *See* 788 F.2d at 839. The court rejected the argument that service by mail was ineffective because it did not comply with Federal Rule of Civil Procedure 4. *Id.* at 840. The court held, "Whether [the plaintiff's] service satisfied Rule 4 . . . is irrelevant because the United States has made no declaration or limitations to its ratification of the Convention regarding Federal Rule 4, or Article 10(a) of the Convention. . . ." *Id. Ackermann* and *Brockmeyer* are squarely at odds; this Court, of course, is bound by the Second Circuit's interpretation of federal law. Because service was proper under the current law in this Circuit, and *Papir and Diamonds Ltd.* only argue that they would have prevailed due to improper service, the motion for summary judgment must be denied.

\* \* \* \*

(2) *Where no formal certificate of service returned by foreign central authority*

In *Burda Media, Inc. v. Viertel*, 417 F.3d 292 (2nd Cir. 2005), the Second Circuit held plaintiffs had properly served defendant in France through procedures in the Hague Convention, despite the French Central Authority's failure to provide plaintiffs with a certificate of service. On September 24, 1997, Plaintiffs Burda Media Inc. and several related entities sued Christian Viertel and others in the Southern District of New York alleging fraud and violation of the RICO Act. Mr. Viertel resides in France. After several unsuccessful attempts to serve Viertel, plaintiffs served Viertel pursuant to the Hague Convention by transmitting several documents to the Ministry of Justice in Paris and requesting service upon Viertel and his companies. Upon receipt of the documents, the Ministry of Justice dispatched local police to serve the documents on Viertel.

The French police attempted to serve Viertel twice, reporting an unsuccessful first attempt and a second attempt in which Viertel accepted documents relating to himself, but not his former companies. Plaintiffs received the two police reports from the French Ministry of Justice, but did not receive a formal Certificate of Service. Plaintiffs filed a Proof of Service with the district court attaching the Hague Convention documents transmitted, the summons and complaint and the two French police reports. The district court subsequently entered a default judgment against Viertel in 2000. In October 2003, Viertel moved to vacate the default judgment on several theories, including improper service of process, and filed an affidavit denying receipt of the summons although not denying receipt of the complaint. The district court denied Viertel's motion to vacate the default judgment, holding, among other things, that plaintiffs had complied with the Hague Convention notwithstanding the failure of the central authority to return a certificate, calling Viertel's affidavit that he did not receive the summons "incredible."

The court of appeals affirmed on both grounds. Excerpts follow from the court's analysis in upholding the lower

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court's decision that a French police report served as an adequate substitute for a formal certificate.

\* \* \* \*

### 1. Procedural Requirements

*Federal Rule of Civil Procedure 4(f)* governs service upon individuals in a foreign country, such as Viertel. The rule allows for service of process "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention." *Fed. R. Civ. P. 4(f)(1)*. Here, both the United States and France are signatories to the Hague Convention, and thus service of process on a defendant in France is governed by the Hague Convention.

The Hague Convention of 1965 was intended "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." Hague Convention, Preamble. The Hague Convention provides for several alternate methods of service: (1) service through the Central Authority of member states; (2) service through consular channels; (3) service by mail if the receiving state does not object; and (4) service pursuant to the internal laws of the state. See *id.* Arts. 5, 6, 8, 9 & 10.

In this case, Burda elected to serve Viertel under the first option: service through the Central Authority. Under this method, process is first sent to the Central Authority of the foreign jurisdiction in which process is to be served, which in this case is the French Ministry of Justice. *Id.* Art. 3. The Central Authority must then arrange to have process served on the defendants. *Id.* Art. 5. Upon completion of service, the Central Authority must complete a Certificate detailing how, where, and when service was made, or explaining why service did not occur. *Id.* Art. 6. Finally, the completed Certificate is returned to the applicant. *Id.*

According to Viertel, service of process failed to conform to three Hague Convention procedures [including] . . . (2) the Ministry of Justice failed to complete and return a formal Certificate. . . .

\* \* \* \*

b. Failure to Return a Formal Certificate

\* \* \* \*

The Hague Convention requires a Central Authority or its designated agent to “complete a certificate in the form of the model annexed to the present Convention.” Hague Convention, Art. 6. This model requires the foreign agency to state whether the service occurred or not and to “include the method, the place, and the date of service and the person to whom the document was delivered.” *Id.*

As the district court properly observed, the police report dated August 12, 1998 provides all of this information and thus serves the same purpose as a formal Certificate: to confirm service, or lack thereof, under the Hague Convention. The fact that the French police, rather than the Ministry of Justice, completed the report is immaterial. The express terms of Art. 6 provide that the Central Authority “or any authority which it may have designated for that purpose” shall complete the Certificate. *Id.* . . .

We see no reason why the police report cannot serve as a substitute for a formal Certificate in this case. Notwithstanding its separate format, the police report provides the same information as the Certificate. The language of Art. 6 does not expressly require the exact form to be filled out, but merely requires a certificate “in the form of the model.” To hold that only the exact form must be used would not only elevate form over substance, but would impose an unreasonably strict degree of compliance with the Hague Convention.

Cases addressing similar issues have held that the failure to comply strictly with the Hague Convention is not automatically fatal to effective service. . . .

\* \* \* \*

Here, Burda attempted in good faith to comply with the Hague Convention. It was certainly not Burda’s fault that the French authorities did not return a formal Certificate. Cf. *Greene*, 1998 U.S. Dist. LEXIS 4093, 1998 WL 158632, at \*3 (“The fact that the French authorities made a mistake—one which appears to be merely clerical—does not render service ineffective.”). Moreover, Viertel suffered no injustice by the return of a police report instead of a formal Certificate: the material information was the same; only the format differed.

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. . . Viertel does not dispute having received the complaint in this action, so . . . there is no prejudice to him.

\* \* \* \*

Finally, in addition to the Hague Convention, service of process must also satisfy constitutional due process. See *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986). Due process requires “notice reasonably calculated . . . to apprise interested parties of the pendency of the action.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Burda’s service of process by personal delivery through the French authorities easily meets this standard, a point which Viertel does not dispute in his brief. . . .

\* \* \* \*

### (3) *Service on foreign defendant’s attorney in the United States pursuant to Fed. R. Civ. P. 4(f)(3)*

In two cases in 2005, the U.S. District Court for the Eastern District of Virginia allowed service on Owais Dagra, an individual residing in Pakistan, by serving Dagra’s attorney in Virginia. *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531 (E.D. Va. 2005) and *BP Products North America, Inc. v. Dagra*, 232 F.R.D. 263 (E.D. Va. 2005).

In *FMAC Loan Receivables v. Dagra*, the plaintiff sought to hold Dagra accountable for “more than \$80 million in unpaid loans that he obtained directly and indirectly through his many businesses.” Despite its best efforts, FMAC had only determined that Dagra “may be residing somewhere in Karachi, Pakistan,” and found only Dagra’s old local addresses. Dagra filed a motion to quash service for failure to effectuate service at his current address, which the court denied. The court granted FMAC’s motion for approval to serve Dagra’s counsel in the United States pursuant to Fed. R. Civ. P. 4(f)(3). Excerpts below summarize FMAC’s prior futile efforts to effect service in Pakistan, thus providing the basis for “invoking the Court’s authority . . . to consider alternative methods of service,” and provide the court’s conclusion that



the Hague Convention does not apply to such service within the United States and that it would satisfy requirements of due process.

\* \* \* \*

In this case, FMAC has earnestly tried to serve Dagra and to perfect service in compliance with Rule 4(f)(1) and the Hague Convention. FMAC has explored every option it believed to be viable to obtain Dagra's address, but to no avail. Contacting Dagra's prior legal representative, business affiliates, and the Consulate General in Karachi, Pakistan have failed to reveal Dagra's current whereabouts. Researching business records and documents, and using on-line research resources was also unavailing. While Dagra argues that FMAC should be required to do more to obtain his current address, upon questioning by the Court, he could not define what additional steps should be required. And a party "need not have attempted every permissible means of service of process before petitioning the court for alternative relief." *Rio Props, Inc.*, 284 F.3d at 1016. Thus, after using due diligence to locate Dagra, FMAC has satisfied the threshold requirement for invoking the Court's authority under Rule 4(f)(3) to request alternative methods of service.

In order to implement Rule 4(f)(3) the means of service must be 1) directed by the Court, and 2) not prohibited by international agreement, including the Hague Convention referenced in Rule 4(f)(1). Pakistan is a party to the Hague Convention. However, the Hague Convention does not apply to this case since "the only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service." *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707, 100 L. Ed. 2d 722, 108 S. Ct. 2104 (1988) . . . . Since service is being requested on defense counsel, whose office is located in Richmond, Virginia, the Hague Convention does not apply. Thus, the means of service requested does not conflict with the requirements of Rule 4(f)(3).

Service under Rule 4(f)(3) must also comply with Constitutional notions of due process. . . .

Based on the facts of this case, it is clear that Dagra would be given proper notice if service was effectuated on his attorney. The

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numerous motions filed by Dagra's attorney, Mr. William R. Baldwin, III of Cherry, Seymour & Hundley, P.C., make it abundantly clear that Dagra has been in constant communications with his attorney. . . . After all, the Virginia Rules of Professional Conduct require him to keep his client informed about the status of his case. Va. Rule of Prof'l Conduct 1.4. And Mr. Baldwin would surely not have filed these numerous motions unless he was specifically authorized by Dagra to act on his behalf. Va. Rule of Prof'l Conduct 1.2(d). Thus, it would be reasonable to expect Mr. Baldwin to communicate with his elusive client and keep him appraised of proceedings in the case against him, if served with process using whatever means he currently utilizes for communications.

\* \* \* \*

In sum, Dagra cannot skirt the jurisdiction of this Court. From the facts of this case, it is obvious that Dagra is well aware of the current suit, but has purposely acted to conceal his whereabouts. His many motions seeking to dismiss the case on substantive non-jurisdictional grounds are evidence that he has some form of notice. To ensure his complete knowledge of the claims pending against him, this Court Orders Plaintiff FMAC Loan Receivables Trust to serve Defendant Owais A. Dagra's attorney, Mr. William R. Baldwin, III, with service of process pursuant to Rule 4(f)(3). Requiring service on defense counsel is reasonably calculated to apprise defendant of the pendency of this action and afford him an opportunity to respond. *See Mullane*, 339 U.S. at 314. Thus, Dagra's Motion to Quash is denied, and FMAC's Motion to Order Approving Service is granted.

In *BP Productions North America, Inc. v. Dagra*, another creditor of Dagra's sought to enforce Dagra's "personal guarantee of over \$12 million in defaulted business loans." Like FMAC, despite its best efforts, BP Products only knew that Dagra "may be residing somewhere in Pakistan." The court, noting that it had "no doubt that the defendant is willfully evading the service of process in this case," allowed BP Products to serve Dagra through the U.S.-based attorney repre-

senting Dagra in the FMAC action against him. In addition to the legal bases cited in *FMAC, supra*, the court explained:

Ordinarily, the Hague Convention would govern service of process in this matter, since both the United States and Pakistan are signatories. However, the Hague Convention contains an explicit exemption where the address of the foreign party to be served is unknown: "This Convention shall not apply where the address of the person to be served with the document is not known." In this case, after plaintiff's numerous attempts to serve defendant at his last two known addresses in Pakistan failed, plaintiffs went so far as to engage the services of an investigative firm in Pakistan. . . . Plaintiff has explored every option it believes to be feasible to obtain defendant's address, but to no avail. Therefore, after having attempted to comply with Rule 4(f)(1), plaintiff now seeks service under Rule 4(f)(3).

\* \* \* \*

***b. Service in suits involving countries not party to the Hague Convention***

***(1) Service by international mail***

In *Igloo Products Corp. v. Thai Welltex International Co. Ltd*, 379 F.Supp.2d 18 (D. Mass 2005), the U.S. District Court for the District of Massachusetts permitted service on a defendant located in Thailand by international registered mail, return receipt requested. The suit alleged trademark infringement on Igloo's line of coolers and related claims. At Igloo's request, on October 28, 2003, the clerk of the district court addressed and dispatched copies of the summons and complaint to defendant via international registered mail, return receipt requested. The clerk received no return receipt, and plaintiff's counsel subsequently re-sent additional copies of the complaint and summons to the defendant by the same method on January 19, 2005. Plaintiff's counsel received a return receipt with an illegible signature in February, 2005.

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The court first noted that:

Fed. R. Civ. P. 4(h) provides that service of a summons and complaint may be effected upon a foreign corporation outside a judicial district of the United States in any manner prescribed by Fed. R. Civ. P. 4(f) except by personal delivery. Rule 4(f)(1) provides that service may be effected in a manner authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents but, because Thailand is not a signatory to that convention, that method is unavailable in the instant case.

Excerpts below explain the court's conclusion that in this situation the plaintiff's attempt to serve defendant by international mail and the defendant's return receipt of the mail was sufficient to put defendant on notice of the pending law suit against it.

\* \* \* \*

. . . Rule 4(f)(2) provides, in relevant part, that service may be effected by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served", as long as that method is not prohibited by the law of the foreign country. Finally, Rule 4(f)(3) provides that service may be effected "by other means not prohibited by international agreement as may be directed by the court."

In addition to complying with the requirements of Rule 4(f), service of process must comport with constitutional notions of due process. . . .

Federal courts have authorized a variety of methods of service pursuant to Rule 4(f)(3), including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex and e-mail. *See Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002) and cases cited therein. The methods employed by plaintiff in this action, including its good faith attempt to serve defendant pursuant to Rule 4(f)(2) and its mailing of another copy of the complaint and summons to defendant, followed by its receipt of the return receipt, are sufficient to put defendant on notice of the pending lawsuit against it.

Plaintiff states that it is not aware of any agreement between the United States and Thailand that forbids service of process by the means that were utilized by plaintiff and the Court, likewise, is aware of none. Service of process upon defendants, therefore, will be approved pursuant to Rule 4(f)(3).

*(2) Service by e-mail pursuant to Fed. R. Civ. P. 4(f)(3).*

Developments in the field of electronic communication continue to pose new questions regarding when, and how, personal jurisdiction can be obtained by personal service of process outside the jurisdiction where litigation has been commenced. Where the Hague Service Convention does not apply, courts have evaluated the propriety of such methods under domestic law, in particular, Fed. R. Civ. P. 4(f). U.S. district courts have recently analyzed whether Fed.R.Civ.P. 4(f)(3) enables courts to direct plaintiffs to serve defendants by electronic mail. Although courts generally have broad discretion in directing service pursuant to Fed.R.Civ.P. 4(f)(3), U.S. law is unsettled regarding whether service by electronic mail ("e-mail") satisfies due process concerns so as to be included in methods of service allowable pursuant to Fed.R.Civ.P. 4(f)(3). In the two cases discussed below the court examined the possibility of authorizing such service and allowed it in the first but denied it in the second. The cases do not address the separate issue of the adequacy of e-mail service for enforcing a resulting judgment abroad.

(1) In *Williams v. Advertising Sex, LLC*, 231 F.R.D. 483 (N.D. W. Va. 2005), Allison Williams brought suit against numerous entities and individuals located in Australia alleging that defendants participated in a conspiracy to defame her by falsely identifying her as a participant in a graphic internet video advertised on multiple websites. Williams unsuccessfully attempted to serve defendants in Australia by hand delivery and international registered mail, and petitioned the court for an order pursuant to Fed.R.Civ.P. 4(3) directing her to effect service by alternate means—namely e-mail, international regis-

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tered mail, and international standard mail. Excerpts below from the opinion explain the court's conclusion that

[t]he authorization of e-mail as an alternative means for service of process under Federal Rule of Civil Procedure 4(f)(3) is a matter of first impression for this Court. Given the plaintiff's previous efforts to formally serve the defendants and the reasonable nature of the alternative service she requests, the Court concludes that service of process by electronic mail is authorized by and warranted under Rule 4(f)(3) of the Federal Rules of Civil Procedure. . . .

(Footnotes have been deleted).

\* \* \* \*

Within the strictures of Rule 4(f) there are three separate methods through which service of process "may be effected in a place not within any judicial district of the United States." In the landmark opinion of *Rio Properties, Inc., v. Rio International Interlink*, 284 F.3d 1007, 1014-15 (9th Cir. 2002), the Ninth Circuit Court of Appeals held that each of Rule 4(f)'s three methods for international service of process is equivalent to one another.\* That is, "Rule 4(f) does not denote any hierarchy or preference of one method of service over another." *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) (citing *Rio*, 284 F.3d at 1015). Further,

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\* Editor's note: In *Rio*, as in this case, the country at issue was not a party to the Hague Convention. In its opinion in *Rio*, the Ninth Circuit made clear that if the country were a party to the Hague Convention, the analysis would be different. The court stated: "By all indications, court-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1)<sup>4</sup> or Rule 4(f)(2)." Footnote 4 provided: "A federal court would be prohibited from issuing a Rule 4(f)(3) order in contravention of an international agreement, including the Hague Convention referenced in Rule 4(f)(1). The parties agree, however, that the Hague Convention does not apply in this case because Costa Rica is not a signatory." In *FMAC Loan Receivables v. Dagra*, discussed in 4.a.(3) *supra*, involving a party to the Hague Convention, the court concluded that FMAC had exercised due diligence in attempting unsuccessfully to find a physical address for service in Pakistan, and thus had "satisfied the threshold requirement for invoking the Court's authority under Rule 4(f)(3) to request alternative methods of service."

“Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)’s other subsections; it stands independently, on equal footing.” *Rio*, 284 F.3d at 1015. Thus, “court-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2).” *Id.*

\* \* \* \*

. . . [T]he district court may require a showing by the plaintiff that reasonable efforts to serve the defendant have already been made and that the court’s intervention will avoid further unduly burdensome or futile attempts at service. *Dagra*, 228 F.R.D. at 534.

Here, Williams has attached numerous exhibits documenting her reasonable efforts to serve the defendants by traditional means. . . .

\* \* \* \*

The first federal court to authorize service of process by e-mail was the Bankruptcy Court for the Northern District of Georgia. In *Broadfoot v. Diaz*, 245 B.R. 713, 715 (Bankr. N.D. Ga. 2000), a Chapter 7 Bankruptcy Trustee brought an adversarial action against a former officer of the debtor corporation for alleged breach of fiduciary duties. The Trustee, however, was unable to serve process on the defendant by traditional means due to the defendant’s extensive and unpredictable European travel. *Id.* at 718. According to the court, the defendant was literally a “moving target.” *Id.* Consequently, the Trustee sought permission to serve the defendant by e-mail and demonstrated to the court the reliability of a known e-mail address of the defendant. *Id.* at 719.

After extensively researching the issue and determining that it was one of first impression, the bankruptcy court in *Broadfoot* held that service of process by means including e-mail was fully authorized by FRCP 4(f)(3), and, indeed, comported with the due process rights of the defendant. *Id.* at 720-21. As the court stated:

[Rule 4(f)(3)] is expressly designed to provide courts with broad flexibility in tailoring other methods of service to meet the needs of particularly difficult cases. Such flexibility necessarily includes the utilization of modern communication technologies to effect service when warranted by the facts. . . . If any methods of communication can be reason-

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ably calculated to provide a defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them.

Two years after *Broadfoot*, the Ninth Circuit became the only court of appeals to recognize the propriety of service of process by e-mail under Rule 4(f)(3), when it held that the district court had not abused its discretion when authorizing e-mail service after traditional attempts at service had failed. *Rio*, 284 F.3d at 1018. Although no other circuits have confronted the issue since *Rio*, a handful of district courts have followed *Rio*'s holding and authorized service of process by e-mail transmission. See, e.g., *Popular Enterprises, LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560 (E.D. Tenn. 2004); *Ryan v. Brunswick Corp.*, 2002 U.S. Dist. LEXIS 13837, No. 02-CV-0133E, 2002 WL 1628933 (W.D.N.Y. May 31, 2002).

In this case, the record establishes that the defendants are “sophisticated participants in e-commerce.” In her motion, Williams has provided e-mail addresses for defendant Scott Moles and related website addresses through which Moles conducts e-commerce. These websites are well established and maintained for the purposes of e-commerce. In short. . . , Williams has demonstrated that a reliable channel of communication to defendant Moles exists by way of e-mail addresses linked to established websites that Moles uses to conduct business.

Further, Williams proposes to serve process by e-mail by utilizing the website service “Proof of Service—electronic” (“PoS-e”), which offers encrypted on-line delivery of documents and returns a digitally signed proof of delivery once the document has been received by the target e-mail, thus enhancing the reliability of electronic service.

Williams has established that her prior attempts to serve the defendants have resulted in Moles’ direct knowledge that he is sought for the receipt of legal documents from the United States. Rather than ease the process, Moles’ knowledge has only erected barriers to formal service. Thus, given the circumstances of this case, a direction to serve process by e-mail in addition to international registered mail and international standard mail to all known addresses of the defendants is “reasonably calculated . . . to apprise interested



parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314 (1950).

\* \* \* \*

Conversely, in *Ehrenfeld v. Mahfouz*, 2005 U.S. Dist. LEXIS 4741 (S.D.N.Y. March 23, 2005), the court held that, in the circumstances of this case, service by e-mail would not comport with constitutional due process for defendants located in Saudi Arabia. Plaintiff Rachel Ehrenfeld filed suit for declaratory relief that the defendant, a resident of Saudi Arabia, could not enforce a default judgment for defamation obtained by UK courts against her. Ehrenfeld identified a website operated by defendant that provided e-mail contact information, a post office box in Saudi Arabia, an address for a business in Saudi Arabia “with which the defendant is affiliated,” and the address of defendant’s attorneys in the United States and UK, but was unable to locate defendant’s residence. Accordingly, Ehrenfeld requested that the court allow her to complete service on defendant by e-mail, post office box mail service, and Federal Express service to defendant’s business address and to defendant’s attorneys pursuant to Fed.R.Civ.P. 4(f)(3). Although not in the Ninth Circuit, the district court stated at the outset that

The only limitations on Rule 4(f)(3) are that the means of service must be directed by the court and must not be prohibited by international agreement. *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002). “Service of process under Rule 4(f)(3) is neither a ‘last resort’ nor ‘extraordinary relief.’ It is merely one means among several which enables service of process on an international defendant.” *Id.* (internal citations omitted). Because the Court is not aware of any international agreement that speaks to service of process in Saudi Arabia, Plaintiff needs only to obtain the Court’s permission. To do so, she must show that “the facts and circumstances of the present case necessitate[] . . . district court[] intervention.” *Id.* at 1016. The proposed means of service must also comport with constitutional notions of due process. *Id.*

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Plaintiff has reasonably asserted that the Court's intervention is needed here. First, Plaintiff does not have the option of utilizing the service means authorized by the Hague Convention because Saudi Arabia is not a party to that treaty. . . . Second, Plaintiff has stated that it would be extremely difficult to identify someone who would be willing to attempt personal service on Defendant in Saudi Arabia. . . . Furthermore, Plaintiff's counsel states that he has been unable to locate a residence address for Defendant. . . . Finally, Plaintiff's counsel requested that Defendant's U.S. attorneys accept service on Defendant's behalf. . . . Those attorneys declined to do so and also declined to provide Plaintiff's counsel with Defendant's residence address. . . . Therefore, Plaintiff has demonstrated that the circumstances of the case necessitate the Court's intervention.

Turning to the requested means of service, the Court first concluded that service on defendant's UK and U.S. attorneys and service via mail to defendant's post-office box would satisfy the requirements of due process and granted plaintiff's motion to effect service by those three means. The court denied plaintiff's request to authorize service on the business, however, stating that it had "no way of knowing" whether service of process on the business would reach the defendant.

As to service by e-mail, the court found that the circumstances of this case differed from cases in which e-mail had been authorized by U.S. courts and also denied that means, as excerpted below.

\* \* \* \*

. . . Although courts have upheld service via e-mail, those cases involved e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes. *See, e.g., Rio Props.* 284 F.3d at 1017-18; *Ryan v. Brunswick Corp.*, 2002 U.S. Dist. LEXIS 13837, No. 02-CV-0133E, 2002 WL 1628933, at \*2 (W.D.N.Y. May 31, 2002). In *Rio Properties*, the Ninth Circuit upheld service via e-mail when the defendant company maintained a

website and designated its e-mail address as its preferred means of communication. *See* 284 F.3d at 1017-18. Similarly, the court in *Ryan* permitted service by e-mail because the defendant maintained an Internet site and listed an e-mail address as a means of business communication. *See* 2002 U.S. Dist. LEXIS 13837, 2002 WL 1628933, at \*2. In contrast, Plaintiff has provided no information that would lead the Court to conclude that Defendant maintains the website, monitors the e-mail address, or would be likely to receive information transmitted to the e-mail address. The website directs individuals seeking information to send inquiries to “information@binmahfouz.info.” . . . In *Rio Properties* and *Ryan*, the e-mail addresses were the mechanisms by which the defendants conducted business, presumably on a daily basis; here, the e-mail address is apparently only used as an informal means of accepting requests for information rather than for receiving important business communications. Accordingly, the Court does not authorize service by e-mail in this case.

Plaintiff’s motion to serve by alternative means under Rule 4(f)(3) is **GRANTED**. Plaintiff shall effect service of process on Defendant by (1) certified mail on Defendant’s U.S. attorneys; (2) Federal Express on Defendant’s U.K. attorneys; and (3) mail to Defendant’s post-office box in Saudi Arabia. Plaintiff shall serve the summons and complaint, along with a copy of this order, within 30 days of the date that this order is entered on the Court’s docket.

\* \* \* \*

### **Cross References**

*Comity discussion in consular rights case, Chapter 2.A.1.c.(1).*

*Amendments to statute of the Hague Conference on Private International Law, Chapter 4.A.3.b.*

*Common-law revenue rule and U.S. criminal prosecution, Chapter 5.A.2.*



## CHAPTER 16

### Sanctions

#### A. IMPOSITION, MODIFICATION, AND IMPLEMENTATION OF SANCTIONS

##### 1. Iraq

##### a. *Continuation of national emergency*

On May 22, 2003, President Bush issued Executive Order 13303, declaring a national emergency protecting the Development Fund for Iraq and certain other property in which Iraq has an interest. 68 Fed. Reg. 31,931 (May 28, 2003). *See Digest 2003* at 914-23 and later developments, as discussed in *Digest 2004* at 883-89. On May 19, 2005, President Bush announced that he was continuing the national emergency for another year. 70 Fed. Reg. 29,435 (May 20, 2005). After summarizing relevant actions taken in 2003 and 2004, the President stated that he was continuing the emergency “[b]ecause the obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States.”

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### ***b. Oil-for-food program***

#### *(1) Establishment and abuses*

In April 1995 the Security Council adopted Resolution 986, U.N. Doc. S/RES/986 (1995), establishing the UN oil-for-food program. Following protracted negotiations between Iraq and the UN Secretary-General, the program went into effect in December 1996. A fact sheet released by the Office of the Spokesman, Department of State, on February 3, 2005, available at [www.state.gov/r/pa/prs/ps/2005/41576.htm](http://www.state.gov/r/pa/prs/ps/2005/41576.htm), described the program briefly as follows. For further information, see *Cumulative Digest 1991-1999* at 1929-36 and subsequent annual volumes.

\* \* \* \*

- . . . [The Oil-for-Food Program] provided Iraq with the opportunity to sell oil to finance the purchase of medicine, health supplies, foodstuffs, materials and supplies for essential civilian needs, while denying it access to goods that could be used to reconstitute its military and weapons of mass destruction programs. The UN Office of the Iraq Program was responsible for overall management of UN humanitarian activities under Resolutions 661 and 986 and for administration of the Program.
- Iraq's initial unwillingness to accept the Security Council's conditions blocked implementation of the Program until December 1996, following the conclusion of a Memorandum of Understanding between UN and Iraqi officials the previous May that specified the arrangements for its implementation.
- Resolution 986, which permitted Iraq to retain control over the selection of oil purchasers and goods suppliers, represented a compromise necessary to maintain support for the continuation of sanctions. The compromise decision over time was abused and manipulated by Saddam Hussein to undermine the Program.
- The Oil-for-Food Program ended in November 2003, as mandated by Security Council Resolution 1483.

The February 3 fact sheet described U.S. efforts to prevent the abuses referred to above as well as its support for and co-operation with the investigations, as excerpted below.

\* \* \* \*

Transparency and Investigations

- Firsthand Iraqi accounts and documentary evidence of abuses of the UN Oil-for-Food Program surfaced in 2003, when the Coalition Provisional Authority obtained access to official Iraqi documents that revealed systemic abuses of the Program by the former Iraqi regime. As early as 2000, the United States brought reports of these abuses to the attention of the UN Security Council and its Iraq Sanctions (“661”) Committee. Charles Duelfer’s October 2004 report provided new information about the extent of Saddam Hussein’s efforts to subvert the Program.
- The United States is committed to ensuring that the serious allegations of fraud, abuse, and corruption related to the Program are investigated fully and transparently. Those responsible for any wrongdoing should be held accountable. Transparency and accountability in UN programs are fundamental to their success.
- The State Department welcomes and actively supports the investigations underway. These are the Independent Inquiry Committee’s probe, U.S. Congressional investigations (Senate Permanent Subcommittee on Investigations; House Appropriations Subcommittee on Commerce-Justice-State; House International Relations Committee; House Government Reform Subcommittee on National Security, Emerging Threats and International Relations; and House Energy and Commerce Committee), as well as the U.S. Justice Department’s probe and the Iraqi Board of Supreme Audit’s investigation.
- Through 2004 and early 2005, the State Department has continued to respond to numerous requests for information and briefings from the investigative committees. It has devoted considerable time and resources to retrieving relevant archived documents covering the span of the Program, mak-

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ing them available to investigators. The process is ongoing; the Department continues to review and share documents.

- Since the Independent Inquiry Committee began its work in April 2004, the State Department has provided access to approximately 1,400 pages of Department documents, including official records on the work of the 661 Committee. It has facilitated multiple interviews with Department employees familiar with the Program, and worked with Iraqi authorities to ensure that the Independent Inquiry Committee was provided relevant Iraqi Oil Ministry documents, numbering in the thousands of pages.
- We have been similarly responsive to requests from Congressional committees for documents. State Department officials have appeared before several Congressional committees, including the Senate Foreign Relations Committee, the House International Relations Committee, and the House Government Reform Subcommittee, to discuss the Program. There have also been numerous briefings of Congressional staff.

### Efforts to Prevent Abuse during the Program

- During the Program's existence, the United States sought on a continuing basis to prevent Iraqi activities such as imposing illegal surcharges on oil sales and seeking kickbacks from suppliers.
- In late 2000, UN Oil Overseers—independent oil experts responsible for reviewing proposed oil purchase contracts and pricing—informed the 661 Committee of reports of an Iraqi scheme to impose illegal surcharges on oil sales. The United States convinced the 661 Committee to issue a statement that surcharges were unacceptable.
- In Spring 2001, the 661 Committee first discussed the issue of oil surcharges. Absent 661 Committee consensus on countermeasures, in early Fall 2001 the United States began to deny approval in the 661 Committee of the pricing proposed by Iraq that had these surcharges attached. Our imposition of this new pricing mechanism began to restrict



significantly Iraq's ability to profit illicitly from these sales within a few months.

- In July 2000, the 661 Committee first discussed allegations of Iraqi demands for kickbacks on humanitarian supply contracts. In March 2001, the United States presented a proposal that member states prosecute companies engaged in kickbacks and bar such companies from further Program participation. The United States also proposed measures to prevent Iraq from levying illegal commissions on contracts. Due to lack of consensus, the 661 Committee took no official action on these proposals.
- In order to prevent Iraq from importing dual-use items for diversion to its military programs, the United States placed holds on questionable contracts worth billions of dollars. In May 2002, the Security Council streamlined the processing of contracts for humanitarian supplies. It authorized export of goods determined by the Office of the Iraq Program to be purely civilian in nature, banned goods that were prohibited under an arms embargo, and mandated a review of dual-use goods contained in a "Goods Review List" before approval.

\* \* \* \*

*(2) Independent Inquiry Committee*

The Independent Inquiry Committee ("IIC") for the oil-for-food program, referred to in the Department of State fact sheet *supra*, was established by UN Secretary-General Kofi Annan in April 2004 to investigate allegations of fraud and corruption. See *Digest 2004* at 893-97.

*(i) Reports issued in 2005*

During 2005 the IIC issued five reports:

- Interim Report: The Initial Procurement of UN Contractors, Benon Sevan and Oil Allocations, Internal Programme Audits, Management of the Programme's Administrative Account (2.2%) (February 3);

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- Second Interim Report: The 1998 Procurement of the Humanitarian Goods Inspection Contract, Other Conduct of UN Officials (March 29);
- Third Interim Report: The Conduct of Benon Sevan, The Conduct of Alexander Yakovlev (August 8);
- The Management of the Oil-for-Food Programme (September 7); and
- Manipulation of the Oil-for-Food Programme (October 27).

The reports, related information, and further information about the IIC are available at [www.iic-offp.org](http://www.iic-offp.org).

Following release of the September 7, 2005, IIC report, "The Management of the United Nations Oil-for-Food Programme," Ambassador John R. Bolton addressed the need for reform of the United Nations to prevent a recurrence of such abuse. The full text of Ambassador Bolton's statement, excerpted below, is available at [www.usunnewyork.usmission.gov/05\\_155.htm](http://www.usunnewyork.usmission.gov/05_155.htm).

\* \* \* \*

The United States will review the report you have delivered carefully and with one principal purpose in mind: to see how we can use the findings and recommendations made in your report to reform and improve the United Nations. Identifying those who failed to execute their responsibilities is a necessary part of the process; prosecuting wrongdoers is equally necessary. But what is most important is to consider the shortcomings of the Oil for Food Program as a catalyst for change at the United Nations.

It appears from the Independent Inquiry Committee's preface that, in spite of success in the humanitarian objective of ensuring that the Iraqi people were adequately fed, there is plenty of blame to go around for the failings of the Oil for Food Program. The US may or may not agree with all of the findings of the Independent Inquiry Committee in this regard. What we can all agree upon is that Saddam Hussein exploited the good will of the international community toward the people of Iraq. He exploited that good will in order to obtain billions of dollars for his personal use and for the use of his regime to strengthen his authoritarian grip on his own people.

We can also agree that there was corruption both inside and outside the UN system, and that this corruption allowed Saddam to achieve many of his illicit goals. There were bribes; there were kickbacks; there was lax oversight from the Secretariat; and some member states turned a blind eye toward this corruption.

We look forward to our heads of state arriving in New York next week to discuss, among other topics, the importance of reforming the UN system. We note the call by Chairman Volcker for greater auditing and management controls—including an independent audit board—stronger organizational ethics, and more active management of the UN and its programs by the Secretariat. We have over the past several days been pushing for exactly that—only to meet resistance from dozens of countries who are in a state of denial—countries which contend that “business as usual” at the UN is fine. This report unambiguously rejects the notion that “business as usual” at the UN is acceptable. We need to reform the UN in a manner that will prevent another Oil for Food scandal. The credibility of the UN depends on it.

On October 27, 2005, the Independent Inquiry Committee released its final report, “Manipulation of the Oil-for-Food Programme by the Iraqi Regime.” Ambassador Bolton issued a statement on the IIC report released that day, as excerpted below. The full text of the statement is available at [www.usunnewyork.usmission.gov/o5\\_189.htm](http://www.usunnewyork.usmission.gov/o5_189.htm)

\* \* \* \*

The Reports show that Saddam Hussein aggressively manipulated a well-intentioned program so that he could divert to his personal use billions of dollars that belonged to the Iraqi people. But he was only able to accomplish this misdeed with the willing cooperation of UN officials, the acquiescence of some member states, and, as today’s report indicates, the willingness of private companies and individuals to pay huge sums in bribes and kickbacks to the Hussein regime.

We note that the investigation into the Oil for Food Program continues with various inquiries being conducted by the United States Congress, and we encourage the IIC and the UN to cooperate

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with these ongoing inquiries. But there are already three clear lessons to be learned from the Oil For Food scandal:

- The management of the UN needs urgent, immediate reform.
- Sanctions regimes need to be strengthened and improved.
- Countries must pursue those people and companies who assisted in the corruption of the sanctions regime.

In the United States, federal and local authorities have already indicted a number of people and companies that allegedly participated in illegal activities relating to the Oil-For-Food Program. The U.S. believes it is the duty of law enforcement agencies in nations around the world to pursue people and companies in their countries that did the same. The best deterrent to future corrupt complicity in the circumvention of sanctions regimes is to prosecute vigorously those many people and entities that profited financially from the corruption of the UN Oil for Food Program.

### (ii) *Protection of IIC information*

One of the Congressional committees investigating the oil-for-food program during 2005 was the House International Relations Committee ("HIRC"). On May 16, 2005, the U.S. District Court for the District of Columbia granted an emergency motion for injunctive relief filed by the United Nations on behalf of the IIC in a case related to that investigation.\* *United Nations v. Parton*, 369 F. Supp. 2d 1 (D.D.C. 2005). In granting a motion to allow the United Nations "access to and inspection of the materials that the defendant allegedly took

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\* HIRC released a report of its findings on the oil-for-food program on December 7, 2005, available at [www.house.gov/international\\_relations/109/OFFP.pdf](http://www.house.gov/international_relations/109/OFFP.pdf). As described in the report, "Robert Parton was a senior investigator with the IIC who, among other responsibilities, headed the investigation of a possible conflict of interest involving the Secretary-General. . . . Mr. Parton disagreed with the IIC's proposed conclusions for its *Second Interim Report* regarding the Secretary-General's knowledge of a conflict of interest [and]. . . resigned from the IIC." Pursuant to a subpoena from the committee, the report stated, "Mr. Parton produced approximately 16,000 pages of documents and other materials." The Committee "ma[de] no findings regarding the disagreement between Mr. Parton and the IIC." *Id.* at 26-30.

from the UN and provided to the [HIRC],” the court described the issue as excerpted below.

\* \* \* \*

On May 9, 2005, the United Nations, acting on behalf of the IIC, requested emergency injunctive relief to prevent former IIC investigator, Robert H. Parton, from responding to congressional subpoenas requiring testimony and the production of documents that Parton allegedly took from the UN. The parties reached a compromise that day and consented to the court entering an order enjoining the defendant from disclosing information that he obtained in the course of his work for the IIC.

Hovering over this case is a political storm the court would rather not enter, a precarious competition by various committees, congressional and otherwise, to figure out exactly what happened at the UN’s controversial Oil-for-Food Program. . . .

The politics of the moment notwithstanding, the court must now address the plaintiff’s emergency motion to modify the temporary restraining order to allow the plaintiff access to and inspection of the materials that the defendant allegedly took from the UN and provided to the [HIRC]. . . . Such a request would typically resolve itself through discovery, but the plaintiff wants this relief immediately so that it can see exactly what the defendant has taken from the plaintiff and, more importantly, whether the plaintiff needs to notify confidential informants, “including residents of a highly volatile part of the world,” that their identities may be revealed.

\* \* \* \*

. . . [T]he court believes that the UN is indeed the party best suited to provide assurances to the international community and to the sources in its investigations. . . . The court takes very seriously the plaintiff’s claim that the lives and safety of certain IIC witnesses may be at risk, . . . and there is no time left for the parties to work out an arrangement with the HIRC for viewing the HIRC’s copies of the documents, (fn. omitted) assuming that such a review would even suffice. . . .

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ORDERED that, by no later than 12:00 p.m. on Tuesday, May 16, 2005, the defendant shall provide the plaintiff the opportunity to inspect and copy all materials that the defendant allegedly copied, removed or otherwise (directly or indirectly) obtained from the IIC. . . .

\* \* \* \*

### 2. Situation in Lebanon

On February 14, 2005, former Lebanese Prime Minister Rafiq Hariri and 22 others were killed in a terrorist bombing attack in Beirut, Lebanon. On February 15, 2005, a statement by the President of the Security Council condemned the bombing, called on the Lebanese Government to bring those responsible to justice, and urged all States to cooperate fully in the fight against terrorism. U.N. Doc. S/PRST/2005/4 (2005), available at <http://documents.un.org>.

Following a report to the Secretary-General of a fact-finding mission led by Deputy Police Commissioner Peter Fitzgerald (U.N. Doc. S/2005/203 (2005) available at <http://documents.un.org>), the Security Council adopted Resolution 1595 on April 7, 2005. U.N.Doc. S/RES/1595(2005). Resolution 1595 established “an international independent investigation Commission based in Lebanon to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices” and called on “all States and all parties to cooperate fully with the Commission, and in particular to provide it with any relevant information they may possess pertaining” to the bombing. The resolution noted “with concern the fact-finding mission’s conclusion that the Lebanese investigation process suffers from serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion” and welcomed the Lebanese Government’s approval of the establishment of an independent commission, and “its readiness to cooperate fully with such a Commission within the framework of Lebanese sovereignty and of its legal system, as expressed in the

letter of 29 March 2005 from the Chargé d'affaires a.i. of Lebanon . . . (S/2005/208)."

In responding to questions from the press on the adoption of Resolution 1595, Ambassador Stuart Holliday, Alternate U.S. Representative for Special Political Affairs, provided the views of the United States as excerpted below. The full text of the exchange is available at [www.usunnewyork.usmission.gov/05\\_064.htm](http://www.usunnewyork.usmission.gov/05_064.htm).

. . . The United States is pleased with the unanimous adoption of Resolution 1595. We were troubled by the issues that were raised in the Fitzgerald Report (S/2005/203). And we want to get to the bottom of this assassination and what we believe to be a terrorist act. We are pleased that the resolution calls upon all states to look into the facts of this unfortunate episode. We welcome the Lebanese government's assurance in its letter of the 29<sup>th</sup> of March to cooperate with the investigation and we will be following the investigation. We expect to hear from the Secretary General in two months with a progress report. And it is very important that the facts of this tragic event are known. . . .

\* \* \* \*

[Resolution 1595 can make a difference in the fact-finding because] the commission has the support of the international community with regard to its mission. We now have the commitment of the government of Lebanon to cooperate with the commission. We are also in this resolution going to see that the commission has the resources it needs to have an adequate investigation. . . .

\* \* \* \*

On October 20, 2005, Secretary-General Kofi Annan transmitted the October 19 report of the commission to the Security Council. U.N. Doc. S/2005/662, available at <http://documents.un.org>. In his letter, the Secretary-General also stated his intention to extend the mandate of the commission until December 15, 2005, "in accordance with paragraph 8 of resolution 1595 (2005). . . . This extension was also requested by Fouad Siniora, the President of the Council of Ministers of the Lebanese Republic, in a letter to me dated 13 October (S/2005/651)."

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Subsequently, on October 31, 2005, the Security Council adopted Resolution 1636 under Chapter VII of the UN Charter. In this resolution the Council welcomed the commission's report and decided to provide for imposition of measures preventing entry or transit and freezing assets on states' territories of "individuals designated by the Commission [established in this resolution] or the Government of Lebanon as suspected of involvement in the planning, sponsoring, organizing or perpetrating" of the terrorist bombing. The Security Council also determined that "this terrorist act and its implications constitute a threat to international peace and security." The resolution also required greater action and cooperation by Syria and that "Syria must cooperate with the Commission fully and unconditionally."

In a statement to the Security Council Syria Ministerial, Secretary of State Condoleezza Rice welcomed the adoption of Resolution 1636, which was co-sponsored by the U.S., France, and Great Britain. Secretary Rice's statement, excerpted below, is available at [www.un.int/usa/05\\_193.htm](http://www.un.int/usa/05_193.htm).

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\* \* \* \*

Mr. President, fellow members of the Security Council: By passing Resolution 1636 this morning, we in the United Nations have declared our support for the Commission's search for truth, which is being ably led by Mr. Detlev Mehlis. We have also affirmed our just demands of the Syrian government—and made it clear that failure to comply with these demands will lead to serious consequences from the international community.

There is a close link between these two actions. For the past 30 years, Syria's occupation of Lebanon penetrated all aspects of its society. Beginning last year, however, Syria's interference became so corrupt and unbearable that it began to galvanize opposition against itself, both within Lebanon and among the international community.

Late last August, the Syrian government dictated the extension of Lebanese President Emile Lahoud's term of office. In response, the international community acted, though some on the Security Council did not want our action to single out Syria by name.



Hence, in Resolution 1559, this Council called for the withdrawal of all foreign forces from Lebanon and summoned all states to respect Lebanese sovereignty.

When the Syrian government met none of these demands, Lebanese Prime Minister Rafik Hariri—a respected leader and admired philanthropist—resigned his post in protest. Not four months later, Prime Minister Hariri was assassinated in a terrorist bombing that claimed the lives of 22 other people.

After mourning their murdered leader, one million Lebanese citizens united in downtown Beirut to publicly call for truth, justice, and freedom from Syrian domination.

Again, the international community acted. We supported the aspirations of the Lebanese people—and helped them to compel Syria to withdraw its military forces from the country.

The Security Council unanimously passed Resolution 1595, which established the UN International Independent Investigation Commission to examine the crime and to identify the guilty.

We have now received the Commission's interim report. And its findings are deeply disturbing.

We are told that “there is converging evidence pointing at both Lebanese and Syrian involvement in this terrorist act.” And we are told that “it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out” without the knowledge of senior Syrian officials.

We have also learned that Syrian officials have sought to impede this investigation by intentionally misleading the Commission—including by providing false testimony. Syria has offered no truthful explanations to these serious allegations. Instead, it has chosen to dismiss the Commission report as politically motivated.

The Syrian government has actively and consistently worked to break the will of the Lebanese people—and to thwart the will of the international community.

At this important time, the United Nations is holding Syria accountable for any further failure to cooperate with the Commission's investigation. The Chapter VII Security Council Resolution that we are passing today is the only way to compel the Syrian government to accept the just demands of the United Nations—and to cooperate fully with the Mehlis investigation.

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\* \* \* \*

Also on October 31, Ambassador Bolton spoke with reporters, as excerpted below. The full text of the press conference is available at [www.un.int/usa/05\\_195.htm](http://www.un.int/usa/05_195.htm).

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. . . I thought it might be useful to go over some of the considerations involved in what amounted to the final draft and its unanimous adoption. And the most significant question was what to do about the next steps that the Security Council would take in the event that there was a lack, a continued lack, of Syrian cooperation. And, you'll all recall, that we've been saying for the past week that the Council was united in intending to send a clear and strong signal to the government of Syria that [its] lack of cooperation was not acceptable, and I think that's clearly what we've done here. The resolution is a Chapter 7 resolution; and the provisions found in operative paragraph 3, for the individual sanctions, clearly warrant Chapter 7 action. Moreover, by laying the basis under Chapter 7, we're prepared for further actions that we can take if the government of Syria does not cooperate. And if you look at paragraph 13, which is a combination of the old paragraphs 12 and 13, the new paragraph 13 states that the Council, if necessary, could consider further action. Now, this is obviously different from the text we had earlier that referred to Article 41 and further actions under the Charter. The question of whether you have to refer to Article 41, of course, is entirely rhetorical, since the Council at any time can take action under any provision of the Charter that it wants. And that's why it's further unnecessary to say "under the Charter", because, after all, how else can the Council act, other than under the Charter? And I would simply note that . . . Chapter 7 provides in Article 41 what measures, not involving the use of armed force are to be employed, and under 42, that it refers to actions that the Council may take. So what we've got here in new 13 is very clearly a statement acting under Chapter 7. The Council has told Syria that if it fails to cooperate, that further action will be on the agenda.

There's a series of . . . smaller changes in the text here, one that I might point out . . . , is in the new operative paragraph 6, where we took note of the Syrian statement on Saturday regarding its cooper-

ation with the Commission and turned into . . . a further requirement by saying we expect the Syrian government to implement in full the commitment that it's now making. . . . [A]ll five permanent members have signed on board, Algeria has signed on board, and obviously everyone else. That makes it unambiguous. The spotlight is now on Syria. . . .

\* \* \* \*

. . . [T]he Mehlis Commission is investigating the assassination of the former head of state of Lebanon, which is a terrorist act and act of aggression. And it's very important that we get to the bottom of it. . . .

\* \* \* \*

. . . [As to individuals to whom measures would be applicable under Operative Paragraph 3 of the resolution], if you look at 3, it says "names designated by the Commission or by the government of Lebanon as suspected of involvement", so the government of Lebanon, if I'm not mistaken, has arrested 10 people. That's a pretty good indication they think they're involved. So we start there and then . . . the committee of the Security Council that's set up under operative paragraph 3 will consider any further designations that are made. But our expectation is that such a designation would be acted upon promptly by the Committee and that individual sanctions would apply against them. And I would note also that, although this refers to suspects in the underlying Hariri assassination, obviously this is probably a one to one correlation between suspects and people who have been impeding the Mehlis Commission, as we can see from the Mehlis Commission's own report, that that would be something to take into account as well. . . .

\* \* \* \*

. . . [T]he point of the language in the first half of paragraph 13 is that we expect that Commissioner Mehlis will come back to the Security Council in advance of December the 15<sup>th</sup> if he meets with continuing non-cooperation. Obviously he's only an investigator in aid of the government of Lebanon. He can't, he has no authority over the government of Syria. So, faced with obstruction, he has no judicial remedies, he has no court in Syria he can go to. That's why

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we've asked him to come back to the Security Council and the Council itself will make the decision as to what further steps are appropriate depending on the circumstances that the Commission Mehlis reports to us.

\* \* \* \*

. . . I think the Syrians should read this as a statement by the Council that we are determined that they cooperate. We've called on them to cooperate. Now we've passed a Chapter 7 resolution, which the international lawyers will tell you is binding on them. So now they're bound to cooperate and they committed to cooperate. And we took their statement about cooperation and turned that into a[n] obligation as well.

**Reporter:** Do you mean by this statement that actions would be sanctions, economic sanctions?

**Ambassador Bolton:** It's unspecified. And it'll depend on what the Syrians do.

\* \* \* \*

On December 12, 2005, President Bush issued a statement condemning yet another terrorist killing in Lebanon:

The murder of Gebran Tueni, a Lebanese patriot, member of parliament, and publisher of one of Lebanon's leading newspapers, is yet another act of violence aimed at subjugating Lebanon to Syrian domination and silencing the Lebanese press. Mr. Tueni was a well-known opponent of Syrian interference in Lebanon. Like so many other brave Lebanese, Mr. Tueni knew that his courageous stand on behalf of Lebanon's independence and freedom carried great risk. Despite these dangers to his life, he returned to Lebanon a day before his assassination to continue his efforts to promote freedom and democracy in his country. I strongly condemn the savage attack on Mr. Tueni and extend my condolences to his family and the families of the other innocent victims killed in Lebanon. Syria must comply with United Nations Security Council Resolutions 1559, 1595, and 1636 and end its interference in Lebanon once and for all.

*See also* Security Council Presidential Statement of the same date. U.N. Doc. S/PRST/2005/61, available at <http://documents.un.org>.

In responding to a question from the press on December 12, Ambassador Bolton stated:

... [A]s we deliberate on a Presidential Statement on the assassination last night of yet another Lebanese Parliamentarian[,] ... it is time to look at the situation in Lebanon as a whole—1559 and 1595 together. ...

The full text of Ambassador Bolton's exchange is available at [www.un.int/usa/05\\_237.htm](http://www.un.int/usa/05_237.htm). *See* Chapter 17.A.3. for discussion of Resolution 1559 requiring Syria to withdraw from Lebanon.

The Security Council, acting under Chapter VII on December 15, 2005, adopted Resolution 1644, extending the mandate of the Commission until June 15, 2006. The Security Council welcomed the second report of the Commission, transmitted by the Secretary-General by letter of December 12, 2005. U.N. Doc. S/2005/775, available at <http://documents.un.org>. The Security Council also acknowledged the Lebanese Government's request that "those eventually charged with involvement in this terrorist attack be tried by a tribunal of an international character," and requested the Secretary-General "to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard." It also authorized the Commission, "following the request of the Lebanese Government, to extend its technical assistance as appropriate ... with regard to ... investigations on the terrorist attacks perpetrated in Lebanon since 1 October 2004."

Ambassador Bolton's remarks with reporters before the Security Council's unanimous decision are excerpted below and available at [www.un.int/usa/05\\_256.htm](http://www.un.int/usa/05_256.htm).

\* \* \* \*

... The United States believes [Resolution 1644] sends a strong signal to Syria that we still require full and unconditional compliance with the obligations of earlier resolutions to cooperate with the

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Mehlis Commission. It's clear they have not yet provided that co-operation and that the importance is really underlined in several respects in this resolution. We have as well authorized the Commission to provide technical assistance to the government of Lebanon at Prime Minister Siniora's request with regard to [investigation of] the other assassinations [since October 2004]. And . . . we will extend the mandate, of course, for six months. So this is a product where we have taken into account the concerns of other governments. We have achieved unanimity for the third time on this matter. And I do think it sends a very strong signal. . . .

\* \* \* \*

. . . [I]t's just critical with respect to Tueni assassination that the Commission can now provide technical assistance to the government of Lebanon to get to that crime scene, to exploit it fully for the evidence and then to be able to follow the leads on what's still, it's sad to say, but still a very hot trail.

\* \* \* \*

### 3. Syrian Sanctions Regulations

On May 11, 2004, President Bush signed Executive Order 13338, entitled "Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria." 69 Fed. Reg. 26,751 (May 13, 2004). *See Digest 2004* at 900-03 for these and other sanctions imposed on Syria in 2004.

The Office of Foreign Assets Control, Department of the Treasury, issued a final rule effective March 31, 2005, promulgating the Syrian Sanctions Regulations, 31 C.F.R. part 542, to implement an assets freeze pursuant to sections 3, 4 and 5 of Executive Order 13338. 70 Fed. Reg. 17,201 (April 5, 2005). Excerpts below from the Background section of the Federal Register publication describe the new regulations, imposed in response to Syria's support of terrorism, military and security presence in Lebanon, pursuit of weapons of mass destruction and missile programs, and undermining U.S. and international efforts with respect to stabilization and reconstruction of Iraq.

\* \* \* \*

Section 3 of the Order [13338] blocks, with certain exceptions, all property and interests in property of those persons designated by the Secretary of the Treasury, in consultation with the Secretary of State, pursuant to criteria set forth in the Order. This blocking of property and interests in property includes, but is not limited to, the prohibition of (i) the making of any contribution of funds, goods, or services by, to, or for the benefit of any person whose property or interests in property are blocked pursuant to the Order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

Section 4 of the Order prohibits any transaction by a United States person that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Order, as well as any conspiracy formed to violate such prohibitions. Section 5 of the Order prohibits the exportation or reexportation of donated articles to Syria and the making of such donations by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 3 of the Order.

\* \* \* \*

Subpart B of the [Syrian Sanctions] Regulations sets forth the prohibitions contained in sections 3, 4, and 5 of the Order. See Sec. 542.201 and 542.205. . . .

Section 542.201, with certain exceptions, blocks all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, of persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to meet the criteria set forth in section 3 of the Order. These criteria include directing or otherwise significantly contributing to:

- (1) The Government of Syria's provision of safe haven to or other support for any persons whose property is blocked under U.S. law for terrorism-related reasons;
- (2) the Government of Syria's military or security presence in Lebanon;
- (3) the Government of Syria's pursuit of the development and production of weapons of mass destruc-

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tion and medium- and long-range surface-to-surface missiles; and (4) any steps taken by the Government of Syria to undermine U.S. and international efforts with respect to the stabilization and reconstruction of Iraq. Also subject to designation are those individuals or entities owned or controlled by, or acting for or on behalf of, directly or indirectly, any person whose property or interests in property is blocked pursuant to the Order.

Sections 542.202 and 542.203 of subpart B detail the effect of transfers of blocked property in violation of the Regulations and the required holding of blocked property in interest-bearing blocked accounts, respectively. Section 542.204 of subpart B provides that all expenses incident to the maintenance of blocked physical property shall be the responsibility of the owners and operators of such property, and that such expenses shall not be met from blocked funds. The section further provides that blocked property may, in the discretion of the Director of OFAC, be sold or liquidated and the net proceeds placed in a blocked interest-bearing account in the name of the owner of the property.

Section 542.205 implements the prohibitions in section 4 of the Order on any transaction that evades or avoids, has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Order, and on any conspiracy formed to violate such prohibitions.

Section 542.206 of subpart B details transactions that are exempt from the prohibitions of part 542 pursuant to sections 203(b)(1), (3) and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)). These exemptions relate to personal communications, the importation and exportation of information or informational materials, and transactions relating to travel. The President determined in section 5 of the Order that donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)), i.e., articles such as food, clothing, and medicine intended to relieve human suffering, would seriously impair the President's ability to deal with the declared national emergency. Accordingly, the donation of such items is not exempt from the scope of these Regulations and is prohibited, unless authorized by OFAC or otherwise authorized by law.



\* \* \* \*

#### **4. Government of Zimbabwe**

In Executive Order 13288, President Bush declared a national emergency blocking the property of persons undermining democratic processes or institutions in Zimbabwe, effective March 6, 2003, for two years. 68 Fed. Reg. 11,457 (Mar. 10, 2003). *See Digest 2003* at 929-30. On March 2, 2005, President Bush extended the national emergency for an additional year “in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. § 1622(d)).” 70 Fed. Reg. 10,859 (March 4, 2005). The President explained:

... I took this action to deal with the unusual and extraordinary threat to the foreign policy of the United States constituted by the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe’s democratic processes or institutions, thus contributing to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African regions.

Because the actions and policies of these persons continue to pose an unusual and extraordinary threat to the foreign policy of the United States, the national emergency . . . and the measures adopted . . . to deal with that emergency, must continue in effect beyond March 6, 2005. . . .

#### **5. Cuba**

On November 8, 2005, Ambassador Ronald Godard, Area Advisor, U.S. Mission to the United Nations, addressed the General Assembly urging countries to vote against a resolution proposed by Cuba, “Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba.” The resolution was adopted by vote. U.N. Doc. A/RES/60/12 (2005). The full text of

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Mr. Goddard's statement, excerpted below, is available at  
[www.un.int/usa/05\\_211.htm](http://www.un.int/usa/05_211.htm).

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The United States trade embargo is a bilateral issue, and should not come before the General Assembly. But since Cuba has raised the issue, we would like to discuss the root of the problems Cuban people face everyday, the failed policies of Fidel Castro. As his economic policies harm the Cuban people, Castro tries to blame the United States for the failures of the government he leads. This resolution makes frequent mention of free trade, yet Castro denies free trade to the Cuban people.

Castro continues with his cynical and baseless claims that the embargo denies Cuba access to food and medicine. But he knows that since 1992, the United States has licensed over \$1.1 billion dollars in the sale and donation of medicine and medical equipment for the Cuban people. Castro knows that the U.S. Government has licensed the export of over \$5 billion worth of agricultural commodities in the past 5 years.

If the people of Cuba are jobless, hungry or lack medical care, as Castro admits, it is because of his economic mismanagement, not the embargo.

Castro has long blocked democracy and economic freedom for the Cuban people, even denying them the right to many forms of self-employment. Castro gives his people a stark choice; work for his regime, or starve. Then he blames the embargo for the problems he created.

Castro claims that the embargo is a blockade. He knows this is a lie. Cuba is free to trade with any other country in the world without interference from the United States. Castro knows that the real reason behind Cuba's trade problems is the failure of his country to pay its bills, and billions of dollars of loans in arrears.

Castro is fully aware that the UN Economic Commission on Latin America (ECLAC) concluded that Cuba must promote small business opportunities to revive its suffering economy. But Castro sees even a corner store as a threat to his power, so he continues to block free market reforms.

Fidel Castro knows what it will take to end the embargo; reforms that will benefit the Cuban people. In 2002, we challenged Castro to permit free and fair elections to the National Assembly. We challenged Castro to open the Cuban economy and allow independent trade unions. President Bush made clear that his response to such concrete reforms would be an effort with the U.S. Congress to ease restriction on trade and travel between the United States and Cuba. Castro answered this challenge for freedom with imprisonment for human rights leaders and trade unionists.

The impediment to a new and vibrant relationship between the United States and Cuba is the dictatorship in Havana. The way forward is through a genuine transition to political and economic liberty for the Cuban people. The moment the Cuban people are fully free is when the floodgates of travel and commerce should open. . . .

\* \* \* \*

## 6. Burma

On August 16, 2005, the Office of Foreign Assets Control, Department of the Treasury, issued an interim final rule amending the Burmese Sanctions Regulations, 31 C.F.R. part 537. 70 Fed. Reg. 48,239 (Aug. 16, 2005). The new rule was effective immediately but public comments, invited to be filed by October 17, 2005, would be considered in development of final regulations.

Excerpts below from the Background section of the Federal Register publication describe the history of sanctions on Burma and the effect of the new amendments. *See also Digest 2003 at 923-28 and Cumulative Digest 1991-1999 at 1880-82.*

\* \* \* \*

On May 20, 1997, in response to the Burmese government's large-scale repression of, and violence against, the democratic opposition, President Clinton issued Executive Order 13047, determining that these actions and policies of the Government of Burma constituted an unusual and extraordinary threat to the national security and foreign policy of the United States and declaring a

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national emergency to deal with that threat. Executive Order 13047 prohibits new investment in Burma by U.S. persons and any facilitation by a U.S. person of new investment in Burma by a foreign person.

On July 28, 2003, the Burmese Freedom and Democracy Act of 2003 (BFDA) was signed into law, to restrict the financial resources of Burma's ruling military junta, the State Peace and Development Council (SPDC). The BFDA requires the President to ban the importation into the United States of products of Burma, beginning 30 days after the date of enactment of the BFDA, as well as to consider blocking the assets of certain SPDC members and taking steps to prevent further financial or technical assistance to Burma until certain conditions are met.

To implement the BFDA and to take additional steps with respect to the Government of Burma's continued repression of the democratic opposition in Burma, the President issued Executive Order 13310 (the "Order") on July 28, 2003. The Order blocks all property and interests in property of the persons listed in the Annex to the Order and of certain persons determined, at a future point, by the Secretary of the Treasury, in consultation with the Secretary of State, to meet the criteria set forth in the Order. It also bans the importation into the United States of products of Burma (while waiving the ban where it would conflict with the international obligations of the United States under certain conventions on diplomatic and consular relations and similar agreements) and the exportation or reexportation to Burma of financial services from the United States or by U.S. persons. The Order exempts from its blocking and financial service prohibitions any transactions pursuant to pre-May 21, 1997 agreements between a U.S. person and any entity in Burma. It authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of the Order.

In implementation of the Order, the Office of Foreign Assets Control ("OFAC") is amending the Burmese Sanctions Regulations, 31 CFR part 537 (the "Regulations"), and, due to the extensive nature of these amendments, reissuing the Regulations in their entirety. Section 537.201 of the Regulations implements section 1

of the Order and blocks all property and interests in property of (1) persons listed in the Annex to the Order; and (2) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to be senior officials of the Government of Burma or of certain Burmese political organizations, or to be owned or controlled by, or acting for or on behalf of, any person whose property or interests in property are blocked pursuant to the Order.

Section 537.202 of the Regulations implements section 2 of the Order. Section 537.202(a) prohibits the exportation or reexportation of financial services to Burma from the United States or by U.S. persons, wherever located. The term exportation or reexportation of financial services to Burma is defined in Sec. 537.305 of the Regulations to mean any activity with a monetary aspect, including, but not limited to, banking services, insurance services, and brokering services. A note to Sec. 537.305 explains the unique nature of this defined term. Section 537.202(b) prohibits any approval, financing, facilitation, or guarantee by a U.S. person, wherever located, of a foreign person's transaction in cases in which that transaction would be prohibited if engaged in by a U.S. person.

Section 537.203 of the Regulations implements section 3 of the Order and prohibits the importation into the United States of articles that are products of Burma.

The pre-existing prohibition on new investment in Burma is set forth in Sec. 537.204.

Section 537.206 of the Regulations implements section 4 of the Order and prohibits any transaction by a U.S. person or within the United States that evades or avoids, or that has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the Order.

Exemptions from the prohibitions contained in the Regulations are set forth in Sec. 537.210. Paragraphs (a), (b) and (d) of Sec. 537.210 contain the exemptions from the President's powers under the International Emergency Economic Powers Act (50 U.S.C. 1702), as set forth in Sec. 203 of that act. Paragraph (c) of section 537.210 implements section 13 of the Order by exempting from the prohibitions contained in the Regulations activities undertaken pursuant to pre-May 21, 1997 contracts, other than those for the

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importation of Burmese products, between U.S. persons and either the Government of Burma or a nongovernmental entity in Burma.

. . . Transactions otherwise prohibited by this part but found to be consistent with U.S. policy may be authorized by a general license contained in subpart E of the Regulations or by a specific license issued pursuant to the procedures described in subpart D of the Reporting, Procedures and Penalties Regulations set forth in part 501 of chapter V of title 31, Code of Federal Regulations. Penalties for violations of the Regulations are set forth in subpart G of part 537.

. . . Sec. 537.404, [is] an interpretive section that explains the circumstances under which transactions incident to licensed transactions are authorized.

\* \* \* \*

### 7. Terrorism

#### *a. Security Council committees*

##### *(1) Statement to 1267 sanctions committee*

On January 10, 2005, Assistant Secretary of the Treasury Juan Zarate and Assistant Secretary of State for Economic and Business Affairs E. Anthony Wayne addressed the UN Security Council 1267 sanctions committee on U.S. compliance with the assets freeze, travel ban, and arms embargo imposed by the Security Council on members of the Taliban and Al-Qaeda under Resolution 1267 and its successors. Excerpts below from their statements address the effect of the sanctions and proposals for enhancing the 1267 process, including through coordination with the Security Council Counter-Terrorism Committee Executive Directorate. The full texts of the statements, which include information concerning U.S. implementation of such sanctions are available at [www.un.int/usa/05\\_001.htm](http://www.un.int/usa/05_001.htm) (Mr. Zarate) and [www.un.int/usa/05\\_002.htm](http://www.un.int/usa/05_002.htm) (Mr. Wayne).

Mr. Zarate:

**The importance of the 1267 Committee and the UN process in developing a worldwide, targeted, terrorist financing sanctions regime**

The importance of this Committee's work and the UN generally in our global campaign against terrorist financing stems from the international nature of the financial system and fact that terrorism knows no borders. The great majority of terrorist financiers and facilitators operate and store their money outside the United States. For designations to have a maximum impact, we must work collaboratively with countries from around the world to develop, implement and apply effective terrorist financing sanctions programs against high value targets.

This is not a simple task. In some cases there is a failure of will, and in others there are insufficient means to take effective action. In either case, we must continue to apply political pressure or provide needed technical assistance to make sure that our designations are more than just words on paper.

Over the past three years, we have all labored tirelessly in this cause, and its persistent work has yielded promising initial results: dozens of countries have joined us in submitting 296 al Qaeda-linked targets for designation by this Committee; scores of countries in every region of the world have either adopted new laws and regulations to fight terrorist financing or are in the process of doing so; and several countries have joined the U.S. to provide technical assistance and training to help front-line states develop counter-terrorist financing and anti-money laundering regimes.

However, this must be the beginning, and not the end, of our efforts. The U.S. and all countries can and must improve our individual and collective efforts to develop and implement effective terrorist financing sanctions regimes.

**The importance of targeted financial sanctions in the global CFT campaign**

Targeted financial sanctions are the cornerstone of our campaign against terrorist financing. In addition to its primary function of swiftly freezing funds and keeping them out of the hands of

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terrorists, if used properly and implemented comprehensively, designations can be invaluable by:

1. shutting down the pipeline through which designated parties raise and move money;
2. informing third parties, who may be unwittingly financing terrorist activity, of their association with supporters of terrorism;
3. deterring non-designated parties, who might otherwise be willing to finance terrorist activity; and
4. forcing terrorists to use potentially more costly, less efficient and/or less reliable means of financing.

These benefits of designation cannot be measured by simply totaling the amount of terrorist-related assets frozen. Terrorist-related accounts are not pools of water awaiting discovery as much as they are rivers, with funds constantly flowing in and out. By freezing accounts, we dam that river, thus not only capturing whatever water happens to be in the river at that moment but, more importantly, also ensuring that the targeted individual or organization can never in the future act as a conduit of funds to terrorists. Indeed, if fully implemented, a designation isolates supporters of terrorism from the formal financial system, incapacitating them or driving them to more expensive, more cumbersome, and riskier channels. The effective implementation of designations can also uncover invaluable information about terrorist financing networks. Investigation of accounts and transactions frozen or blocked in accordance with UN member state obligations can lead to terrorist financiers, intermediaries and operatives for further action. In the U.S., authorities can quietly gather this information through the application of a new tool under Section 314(a) of the USA PATRIOT Act. Section 314 allows the Treasury Department, through our Financial Intelligence Unit (FIU), the Financial Crimes Enforcement Network (FinCEN), to circulate requests for information about specific targets throughout our banking system. Banks having any such information report back to FinCEN, which then passes this along to appropriate law enforcement authorities for follow up action. This invaluable tool allows us to identify and unravel terrorist networks without alerting them to ongoing investigations. However, for states that lack this capability, designations



may be the best way to discover and immediately interdict terrorist financial activity occurring within their financial systems.

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**The delisting process, licensing and the protection of civil liberties**

In order to be effective, our terrorist financing sanctions regime must also be fair. We expend additional considerable resources to ensure that our terrorist financing sanctions program respects the civil liberties and rights of designated parties and others affected by our terrorist financing sanctions. Federal regulation affords all designated parties with a right to seek delisting. On two occasions in 2002, Treasury's former Under Secretary Gurule appeared before this Committee to discuss and explain the U.S. delisting process, which assisted in the development of a delisting process eventually adopted by this Committee. Both our U.S delisting process and that of this Committee have been successfully utilized by petitioners who have demonstrated that circumstances underlying their designations no longer applied. It is important to recognize that these delisting actions not only demonstrated an appropriate consideration of the rights of designated parties, but they also validated the effectiveness of designations as a tool in our overall efforts to combat terrorist financing. In those instances, our designations, and those of this Committee, eliminated a terrorist financing threat by changing behavior of parties previously presenting such a threat.

\* \* \* \*

Mr. Wayne:

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**Enhancing the 1267 process**

We would like to suggest three areas for possible examination by the Committee as it continues its work to oversee and improve implementation of the existing measures, and as it considers recommendations to strengthen our collective efforts in combating terrorism, including the shaping later this year of a new resolution. These are:

First, enhancing the sanctions list;

Second, promoting international standards; and

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Third, promoting bilateral and multilateral cooperation.

We believe each of these would present real opportunities for critical leadership, whether by the Committee, the Monitoring Team or in cooperation with other Security Council bodies such as the Counter-Terrorism Committee (CTC).

Paragraph 16 of Resolution 1526 [2004] reiterates the importance to all States of proposing names for inclusion on the Committee's list.

We believe that achieving this goal in practice would mark a major advance in enhancing the list. Many governments in all parts of the world depend on the 1267 and other UN lists as the foundation of their own asset freezing action.

The United States has been particularly active in submitting names for consideration by this Committee. We also have worked to support similar efforts by other governments.

We would be interested in hearing further from the Committee if it is considering plans aimed at assisting individual states to propose names for its list.

Paragraph 14 of Resolution 1526 calls for greater cooperation between the Committee and other organizations and interested parties.

As Members who are active in the Financial Action Task Force (FATF) know, the United States is a strong supporter of its efforts to develop and support international anti-money laundering and counter-terrorism standards.

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The FATF has become increasingly involved with terrorist financing issues. It has supported the development of FATF-style regional bodies, and has increased the number of its Special Recommendations to nine.

Special Recommendation III deals specifically with asset freezes. We ask whether the Committee might consider including an endorsement of the FATF standards, in letter or in spirit, in its next resolution. Such a provision could create new synergies and relationships to support the objectives of both organizations.

Paragraph 24 of UNSCR 1526 urges greater involvement by international, regional and sub-regional organizations in capacity building.

We support this proposition in full. U.S. government agencies and regulators have provided extensive training with many partners since 9/11 on terrorism finance. In addition, just last month we extended an invitation to European Union experts to join future counter-terrorism finance training and technical assistance missions to priority countries within the context of our framework dialogue on terrorism finance issues.

We would ask whether the Committee and its Monitoring Team sees value in exploring increased national capacities to implement asset freezes, travel bans and arms embargoes through exchanges of experience and best practices among experts confronting similar challenges in different countries.

Several major initiatives—IMF, FATF, CTAG are aimed at assessing countries' individual needs in the areas of counter-terrorism or terrorist financing, or matching them with donors. But none is aimed at bringing together experts from countries hindered by limited capacity in order to share their experiences in confronting similar problems and challenges.

If the Committee considers that there might a role for the United Nations in bringing together these experts, we urge that this be raised in the Council's Counter-Terrorism Committee and that the 1267 Committee's Monitoring Team work with the CTC's Counter-Terrorism Executive Directorate to develop initiatives to achieve this. The United States would welcome the opportunity to discuss this possibility further with this Committee and the CTC.

Mr. Chairman, let me conclude by noting that among the many lessons from our experience of putting Resolution 1267 into practice in the United States the most important is the fact that the worldwide effectiveness of its sanctions follows directly from the success of individual Member States to work together in implementing them.

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### *(2) Security Council review of 1267, 1373 and 1540 committees*

On April 25, 2005, the Security Council heard briefings on the work of the Al-Qaeda/Taliban Sanctions Committee (established under Resolution 1267), the Counter Terrorism Committee (established under Resolution 1373), and the Committee on Non-Proliferation of Weapons of Mass Destruction (established under Resolution 1540). A statement by the U.S. delegation welcomed the Council's review of the three committees at the same meeting. Excerpts from the U.S. written statement set forth below provide its views on cooperation among the committees and specific comments on the 1267 and 1373 committees. The full text of the statement is available at [www.un.int/usa/05\\_o8o.htm](http://www.un.int/usa/05_o8o.htm).

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Today's Security Council meeting marks the first time that the Council is reviewing the work of its three committees involved in combating terrorism in a single meeting. We hope that this serves as a precedent for the Council's future consideration of the work of these bodies. While each body has a different mandate, and, of course, the 1540 Committee is concerned with more than terrorism, the need for greater cooperation and coordination among them and their respective staff bodies is obvious.

We hope today's Presidential Statement [S/PRST/2005/16(2005)] provides impetus for strengthened cooperation through enhanced information sharing, coordinated visits to countries, and other activities by the different bodies. We encourage the three Committees to work together to develop a common approach to address problems that affect each of them, for example, non- and late-reporting. We hope that today's meeting serves to reinforce the point that each is a committee of the whole of the same body—the Security Council. In the end, however, coordination and cooperation is only a means to an end. The end remains getting all States to implement fully the counter-terrorism and non-proliferation obligations in resolutions 1267, 1373, 1540 and their progeny.

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Going forward, we hope that the [Counter-Terrorism Committee (CTC)] will soon be able to heed the Council's request in resolution 1566 to develop a set of best practices to assist States in implementing the provisions of resolution 1373 relating to the financing of terrorism. We then want the CTC to develop a set of best practices in each of the other areas of the resolution, in each case, building off of the work of technical organizations. After more than three and a half years monitoring States' efforts to implement th[e] various provisions of the resolution, these CTC best practices documents, would go a long way to helping States get a better understanding of what steps should be taken to implement the various provisions of resolution 1373.

Without a fully operational CTED [Executive Directorate], however, it will be difficult for the CTC to fulfill its mandate, let alone the latest 90-day work program, which is being endorsed today. . . . [W]e call upon all relevant parts of the UN system to do their utmost to ensure this happens as soon as possible.

Turning to the 1540 Committee, we would like to emphasize the importance that the United States attaches to preventing the proliferation of weapons of mass destruction and their means of delivery. This is a national priority and the 1540 Committee has an important role to play in this regard.

. . . We are pleased that the Committee, with the help of its group of experts, has begun to review the reports submitted by States, with a view to monitoring their efforts to implement resolution 1540. Over the next few months, the Committee will be seeking to develop as full a picture as possible of each State's capacities in this area. . . .

Regrettably, some seventy-five States still have not submitted their first report to the Committee; this, despite the fact that the deadline was October 28, 2004. . . . [Some] States might feel they do not need to report given that they neither possess weapons of mass destruction nor the capacity to develop them. This is not an excuse for failing to report. These States should remember that if they do not have adequate border and other controls, as required under resolution 1540, they could find themselves being used as a transit State for the illicit trafficking in these weapons. . . .

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The United States Government continues to devote significant time and resources to the problems associated with terrorism finance, particularly as these matters relate to the ongoing threat posed by Al-Qaeda. The work of the Financial Action Task Force, or FATF—housed at the Organization of Cooperation and Development in Paris—represents the best multilateral thinking and consensus on the terrorist financing problem. In Resolutions 1373 (2001), 1526 (2004), and 1566 (2004), the Security Council de facto affirmed eight of the FATF Nine Special Recommendations on Terrorist Financing. Assistant Secretary of State Tony Wayne, in his January presentation to the 1267 Committee, recommended that the Council endorse the FATF Nine Special Recommendations as a means of strengthening the sanctions measures against Al-Qaeda. The U.S. Delegation supports increased cooperation between the efforts of the Organization for Economic Cooperation and Development (OECD) and the Security Council to more decisively confront the threat to international peace and security posed by al-Qaeda.

We welcome the recent submission by a number of Member States of names to be included on the 1267 Committee's Consolidated List of individuals and entities having ties to Al-Qaeda and the Taliban. We encourage all States to submit such names, by including, as paragraph 17 of Resolution 1526 (2004) states, identifying information and background justification to demonstrate the association of such individuals or entities with Usama bin Laden, or with members of Al-Qaeda or the Taliban.

Finally, . . . I wish to comment on the critical importance the U.S. Government continues to attach to the responsibility of Member States to implement and enforce the measures against Al-Qaeda and the Taliban already authorized by the Security Council. We need a standard of accountability and compliance against which the efforts of individual states can be measured.

. . . [T]he United States Delegation remains fully committed to the work of the 1267 Committee in meeting these challenges. . . . There are no more pressing priorities of this Council than the ongoing fight against global terrorism, particularly the threat posed by Al-Qaeda.

***b. Adoption of Security Council Resolution 1617***

On July 29, 2005, the UN Security Council adopted Resolution 1617, "Threats to international peace and security caused by terrorist acts," strengthening international sanctions on terrorists associated with Al-Qaeda and the Taliban. The Department of State released a media note dated August 3, 2005, welcoming adoption of the resolution, as excerpted below. The full text of the media note is available at [www.state.gov/r/pa/prs/ps/2005/50737.htm](http://www.state.gov/r/pa/prs/ps/2005/50737.htm).

The United States welcomes the Security Council's July 29<sup>th</sup> unanimous adoption of Resolution 1617, reaffirming and strengthening international sanctions on Al-Qaida, the Taliban, and their associates.

Agreement on this Resolution expresses the shared commitment of the global community in the fight against terrorism. The United States worked closely with other members of the Security Council in the drafting of the Resolution, and looks forward to deepening our partnership with the United Nations and with governments around the world in working to implement its provisions.

Resolution 1617 improves the international community's efforts to combat terrorism by more clearly identifying terrorists who are subject to UN sanctions, by endorsing an effective set of standards and practices for implementing the financial sanctions imposed on them, and by facilitating cooperation among various counter-terrorism committees and bodies. It also extends the mandate of the Analysis and Monitoring Team, which helps the Council oversee the implementation of these sanctions. Sanctions were initially imposed by Resolution 1267 in 1999, and, among other results, have provided the foundation for multilateral efforts to deny use of the international financial system to designated terrorists.

Resolution 1617 carries forward a consolidated list of terrorists tied to the Taliban, Usama bin Laden, and Al-Qaida. Inclusion on the list triggers international obligations upon all UN member countries, requiring them to freeze the assets and prevent the travel of listed individuals and to block the sale of arms and military equipment.

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The State Department and U.S. embassies overseas have played a central role in the United States' efforts to support implementation of these sanctions, and will continue to do so.

### Cross References

*Counterterrorism, counter-narcotics, and money-laundering sanctions*, Chapter 3.B.1.f., B.3.a., and B.7.

*Sanctions related to the ICC*, Chapter 3.C.2.c.

*Sanctions on trade related to certain marine wildlife*, Chapter 13.A.2.c.(4) and (6).

*Arms embargo related to Darfur*, Chapter 17.A.2.b.

*Non-proliferation sanctions*, Chapter 18.C.3.



## CHAPTER 17

# International Conflict Resolution and Avoidance

### A. PEACE PROCESS AND RELATED ISSUES

#### 1. Israeli-Palestinian Conflict

##### *a. Election of Palestinian President Abbas and subsequent developments*

On January 9, 2005, Palestine Liberation Organization (“PLO”) Chairman Mahmud Abbas won approximately 62 percent of the popular vote in a presidential election regarded as generally free and fair. On February 8, President Abbas and Israeli Prime Minister Ariel Sharon, meeting with Egyptian President Hosni Mubarak and King Abdullah of Jordan in Sharm el-Sheikh, Egypt, agreed to renewed efforts to cease violence and hostilities.

Following these developments, representatives of the United States, the European Union, Russia and the United Nations (the “Quartet”) met in London and issued a joint statement on March 1, 2005, stating:

The Quartet recognizes the importance of the Sharm el-Sheikh summit of February 8 at which President Abbas announced a halt to violence against all Israelis, and Prime Minister Sharon announced a halt to military activities against all Palestinians, and expresses its appreciation to Egypt and Jordan for their roles. The Quartet urges

the full implementation of the mutual commitments made at the summit by both parties, and urges all countries to support their efforts. The Quartet commends the Israeli cabinet's recent approval of the initiative to withdraw from Gaza and parts of the West Bank, and reiterates that withdrawal from Gaza should be full and complete and should be undertaken in a manner consistent with the Roadmap, as an important step toward the realization of the vision of two democratic states, Israel and Palestine, living side by side in peace and security. The Quartet calls for the resumption of progress towards the implementation of both parties' obligations under the Roadmap. The Quartet reiterates its view that no party should undertake unilateral actions that could prejudice the resolution of final status issues. Quartet members agree on the need to ensure that a new Palestinian state is truly viable, including with contiguous territory in the West Bank. A state of scattered territories will not work.

The statement also "reaffirmed [the Quartet's] commitment to help Israelis and Palestinians make progress toward the two-state solution which is so deeply in both their interests" and "condemned in the strongest possible terms" a February 25 terrorist attack in Tel Aviv. On this point, the statement continued:

The Quartet called for immediate action by the Palestinian Authority to apprehend and bring to justice the perpetrators. The Quartet welcomed President Abbas' condemnation of the attack and pledge to act against those responsible, noted the initial steps taken in this regard, and stressed the need for further and sustained action by the Palestinian Authority to prevent acts of terrorism. Noting the fragility of the current revived momentum in discussions the Quartet encourages the two parties to continue on the path of direct dialogue and negotiation.

The full text of the joint statement is available at [www.state.gov/r/pa/prs/ps/2005/42829.htm](http://www.state.gov/r/pa/prs/ps/2005/42829.htm).

On February 7, 2005, Secretary of State Condoleezza Rice in Tel Aviv announced U.S. Army Lieutenant General William

Ward as senior U.S. security coordinator “to assist the Palestinian Authority to consolidate and expand their recent efforts on security and encourage resumption of Israeli-Palestinian security coordination including, if necessary, through the tri-lateral security committee. General Ward will also work with Egypt, Jordan and others to coordinate assistance to the PA as it rebuilds its security capacity to end violence and terror and restore law and order.” Secretary Rice’s statement, excerpted further below, is available at [www.state.gov/secretary/rm/2005/41936.htm](http://www.state.gov/secretary/rm/2005/41936.htm).

This is the most promising moment for progress between Palestinians and Israelis in recent years. . . .

We are very encouraged by the initial steps that the Palestinian leadership has taken on security, toward the restoration of law and order, and in establishing the basis for a cease-fire. We have also been assured by President Abbas of the Palestinian Authority’s intention to bring [to] justice [] those who murdered three American personnel in [] Gaza in 2003. We are encouraged, too, by the Israeli reaction to the Palestinian steps on security. Working together, the parties have created a very positive atmosphere for tomorrow’s important summit.

I want to commend President Mubarak for the active leadership role that the government of Egypt is playing, and I also want to express the United States’ appreciation for the constructive efforts of the Jordanian government. There is much that remains to be done by both sides, and the United States will do everything that we can to help.

On April 11, 2005, Secretary Rice announced, on behalf of all members of the Quartet, the appointment of President of the World Bank James Wolfensohn as Special Envoy for Gaza Disengagement:

. . . Mr. Wolfensohn will focus his efforts on two areas: first, Palestinian-Israeli coordination concerning the non-military aspects of the withdrawal, including the disposition of the assets that will be left behind; and second, the revival of the Palestinian economy in the wake of the withdrawal.

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See [www.state.gov/secretary/rm/2005/44641.htm](http://www.state.gov/secretary/rm/2005/44641.htm).

The United States joined in a further Quartet statement in Moscow on May 9, 2005, which, among other things, addressed the roles of Special Envoy Wolfensohn and of U.S. Security Coordinator General Ward, as excerpted below. The full text of the statement is available at [www.state.gov/r/pa/prs/ps/2005/45845.htm](http://www.state.gov/r/pa/prs/ps/2005/45845.htm).

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The Quartet expresses its full support for its Special Envoy for Gaza Disengagement, James Wolfensohn. His mandate is to focus on the non-security aspects of withdrawal, particularly disposition of assets; passages, access and trade; and revival of the Palestinian economy during and after Israeli withdrawal. This will require close coordination with both Israel and the Palestinians to identify and implement those actions and policies that will ensure a smooth and successful implementation of the Israeli initiative. On the Palestinian side, this includes above all a strong commitment to security reform and performance; and the building of transparent, accountable government institutions and an investor-friendly climate, with a view to restoring growth. On the Israeli side, this involves relieving the economic hardships faced by the Palestinian people and facilitating rehabilitation and reconstruction by easing the system of restrictions on the movement of Palestinian people and goods and taking further steps to respect the dignity of the Palestinian people and improve their quality of life—without endangering Israeli security—and taking into consideration the World Bank report of December 2004. At the London meeting on March 1, the international community underscored its readiness to play a vital role by providing financial support to the Palestinians at this critical moment. Creating the environment conducive for a long-term, sustainable and viable economic development of all the Palestinian territories would constitute a suitable basis for additional assistance efforts by the international community.

The Quartet emphasizes Mr. Wolfensohn's mandate to promote direct dialogue and cooperation between Palestinians and Israelis on these economic issues, to ensure a smooth transition in

Gaza and parts of the northern West Bank. In this context, the Quartet stresses the urgent need for Israelis and Palestinians to coordinate directly and fully on withdrawal preparations.

The Quartet recognizes that economic development and progress on security go hand in hand as security reforms and the reestablishment of the rule of law are necessary to create an enabling environment for economic growth and political progress. The Quartet also recognizes the need for continued efforts by the international community to assist the PA in accomplishing these tasks, including rebuilding the capabilities of the Palestinian security services. Ongoing assistance by the international community, in particular members of the Quartet and countries of the region, constitutes a significant contribution to these efforts. The Quartet calls upon Israel and the Palestinian Authority to facilitate these efforts.

In that regard, the Quartet expresses its full support for General William Ward, U.S. Security Coordinator, to assist the Palestinians in reforming and restructuring their security forces, and to coordinate international assistance towards those efforts. The Quartet welcomes the recent concrete steps that President M. Abbas has taken towards reform of the Palestinian security services, and stresses the need to continue implementation of these reforms in order to permanently reinstate law and order in Gaza and the West Bank.

The Quartet commends the Palestinian people's and leadership's commitment to democracy and attaches great importance to a successful continuation of the democratic process. The latest round of municipal elections has just been conducted. The Quartet commends the Government of Israel for facilitating the operations. The holding of free, fair, and transparent multi-party legislative elections in the West Bank, Gaza and East Jerusalem, under the scrutiny of international observers, will be another vital step forward on the path towards building a reformed and accountable Palestinian Authority. As additional voter registration for these elections has just begun, the Quartet calls on both the PA and Israel to urgently take all necessary steps, including freedom of movement for candidates and voters, to achieve this goal and renews its offers of technical support and providing election observation services.

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The Quartet deems it necessary to ensure continued efforts aimed at full implementation of the Roadmap following Israeli withdrawal from Gaza and parts of the northern West Bank.

In a meeting with Prime Minister Sharon at his ranch in Crawford, Texas, on April 11, 2005, President Bush reiterated the views of the United States, as excerpted below. The full text of remarks to the press by both President Bush and Prime Minister Sharon is available at [www.whitehouse.gov/news/releases/2005/04/20050411-2.html](http://www.whitehouse.gov/news/releases/2005/04/20050411-2.html).

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Prime Minister Sharon is showing strong visionary leadership by taking difficult steps to improve the lives of people across the Middle East—and I want to thank you for your leadership. I strongly support his courageous initiative to disengage from Gaza and part of the West Bank. The Prime Minister is willing to coordinate the implementation of the disengagement plan with the Palestinians. I urge the Palestinian leadership to accept his offer. By working together, Israelis and Palestinians can lay the groundwork for a peaceful transition.

The Prime Minister and I discussed the important and encouraging changes taking place in the region, including a Palestinian election. We discussed the need for Israel to work with the Palestinian leadership to improve the daily lives of Palestinians, especially their humanitarian situation, so that Israelis and Palestinians can realize a peaceful future together.

I reiterated that the United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign and independent. The United States will continue working with the international community to help Palestinians develop democratic political institutions, build security institutions dedicated to maintaining law and order, and dismantling terrorist organizations, reconstruct civic institutions, and promote a free and prosperous economy.

I remain strongly committed to the vision of two democratic states, Israel and Palestine, living side by side in peace and security. The Prime Minister and I reaffirmed our commitment to that vision and to the road map as the only way forward to realize it. The road

map has been accepted and endorsed by both Israel and the Palestinian Authority, along with virtually the entire international community. The Prime Minister and I share a desire to see the disengagement from Gaza and part of the West Bank serve to re-energize progress along the road map.

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I told the Prime Minister of my concern that Israel not undertake any activity that contravenes road map obligations or prejudice final status negotiations. Therefore, Israel should remove unauthorized outposts and meet its road map obligations regarding settlements in the West Bank.

As part of a final peace settlement, Israel must have secure and recognized borders. These should emerge from negotiations between the parties in accordance with United Nations Security Council Resolutions 242 and 338. As I said last April, new realities on the ground make it unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949. It is realistic to expect that any final status agreement will be achieved only on the basis of mutually agreed changes that reflect these realities. That's the American view. While the United States will not prejudice the outcome of final status negotiations, those changes on the ground, including existing major Israeli population centers, must be taken into account in any final status negotiations.

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In a meeting with President Abbas at the White House on May 26, 2005, President Bush addressed many of the same issues, as excerpted below. The full text of the press conference held on that day is available at [www.whitehouse.gov/news/releases/2005/05/20050526.html](http://www.whitehouse.gov/news/releases/2005/05/20050526.html). See also press conference with President Abbas at the White House on October 24, 2005, available at [www.whitehouse.gov/news/releases/2005/10/20051020.html](http://www.whitehouse.gov/news/releases/2005/10/20051020.html).

We meet at a time when a great achievement of history is within reach, the creation of a peaceful, democratic Palestinian state. Pres-

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ident Abbas is seeking that goal by rejecting violence and working for democratic reform. I believe the Palestinian people are fully capable of justly governing themselves, in peace with their neighbors. I believe the interests of the Israeli people would be served by a peaceful Palestinian state. And I believe that now is the time for all parties of this conflict to move beyond old grievances and act forcefully in the cause of peace.

President Abbas's election four months ago was a tribute to the power and appeal of democracy, and an inspiration to the people across the region. Palestinians voted against violence, and for sovereignty, because only the defeat of violence will lead to sovereignty.

Mr. President, the United States and the international community applaud your rejection of terrorism. All who engage in terror are the enemies of a Palestinian state, and must be held to account. We will stand with you, Mr. President, as you combat corruption, reform the Palestinian security services and your justice system, and revive your economy. Mr. President, you have made a new start on a difficult journey, requiring courage and leadership each day—and we will take that journey together.

As we work for peace, other countries must step up to their responsibilities. Arab states must take concrete measures to create a regional environment conducive to peace. They must offer financial assistance to all—to support the peaceful efforts of President Abbas, his government and the Palestinian people. And they must refuse to assist or harbor terrorists.

Israel must continue to take steps toward a peaceful future, and work with the Palestinian leadership to improve the daily lives of Palestinians, especially their humanitarian situation. Israel should not undertake any activity that contravenes road map obligations or prejudice final status negotiations with regard to Gaza, the West Bank and Jerusalem.

Therefore, Israel must remove unauthorized outposts and stop settlement expansion. The barrier being erected by Israel as a part of its security effort must be a security, rather than political, barrier. And its route should take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities. As we make progress toward security, and in accordance with the road map, Israeli forces should withdraw to their positions on September the 28th, 2000.



Any final status agreement must be reached between the two parties, and changes to the 1949 Armistice lines must be mutually agreed to. A viable two-state solution must ensure contiguity of the West Bank, and a state of scattered territories will not work. There must also be meaningful linkages between the West Bank and Gaza. This is the position of the United States today, it will be the position of the United States at the time of final status negotiations.

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As we work to make the disengagement succeed, we must not lose sight of the path ahead. The United States remains committed to the road map as the only way to realize the vision of two democratic states living side-by-side in peace and security. It is through the road map that the parties can achieve a final permanent status agreement through direct negotiations.

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Following a meeting at the United Nations on September 20, 2005, the Quartet issued a statement “recogniz[ing] and welcom[ing] the successful conclusion of the Israeli withdrawal from Gaza and parts of the northern West Bank and the moment of opportunity that it brings to renew efforts on the Roadmap.” The statement continued:

... The Quartet reiterates its belief that this brave and historic decision should open a new chapter on the path to peace in the region. It paid tribute to the political courage of Prime Minister Sharon and commends the Israeli government, its armed forces and its police for the smooth and professional execution of the operation. It also expresses its appreciation for the responsible behavior of the Palestinian Authority and people for helping maintain a peaceful environment during the evacuation. The Quartet applauds the close coordination between the Israeli and Palestinian security services during the process. These significant developments create new opportunities and call for renewed focus on the responsibilities of all parties. The conclusion of disengagement represents an important step toward achieving the vision of two demo-

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cratic states, Israel and Palestine, living side-by-side in peace and security.

The full text of the statement is available at [www.state.gov/p/nea/rls/53569.htm](http://www.state.gov/p/nea/rls/53569.htm).

The Quartet issued statements on October 28 and December 5, 2005, condemning terrorist attacks in the Hadera market (available at [www.state.gov/p/nea/rls/57651.htm](http://www.state.gov/p/nea/rls/57651.htm)) and Netanya (available at [www.state.gov/p/nea/rls/57650.htm](http://www.state.gov/p/nea/rls/57650.htm)), respectively. Both statements noted that representatives of Palestinian Islamic Jihad had claimed responsibility. In the December 5 statement, the Quartet “repeat[ed] its demand that the Syrian government take immediate action to close the offices of Palestinian Islamic Jihad and to prevent the use of its territory by armed groups engaged in terrorist acts.”

On December 28, 2005, the Quartet “welcome[d] the upcoming Palestinian legislative Council elections as a positive step toward consolidation of Palestinian democracy and the goal of a two-state solution to the Israeli-Palestinian conflict.” The full text of the statement, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/58532.htm](http://www.state.gov/r/pa/prs/ps/2005/58532.htm).

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The Quartet recalled its September 20 statement, together with the Secretary General’s subsequent statement on behalf of the Quartet that ultimately those who want to be part of the political process should not engage in armed group or militia activities, for there is a fundamental contradiction between such activities and the building of a democratic state. In this regard, the Quartet calls on all participants to renounce violence, recognize Israel’s right to exist, and disarm. The Quartet is encouraged by the negotiation of a Code of Conduct governing participation in the legislative council election. It calls on all parties and candidates in the Palestinian Legislative Council elections to agree and fully adhere to this Code to ensure an environment conducive to free and fair elections and international observer support. The Quartet welcomed the Palestinian Authority’s invitation to international election observers.

Furthermore, the Palestinian Authority should take additional steps to ensure the democratic process remains untainted by violence, by prohibiting political parties from pursuing their aims through violent means, and by moving expeditiously to codify this as Palestinian law. In particular, the Quartet expressed its view that a future Palestinian Authority Cabinet should include no member who has not committed to the principles of Israel's right to exist in peace and security and an unequivocal end to violence and terrorism.

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***b. Agreement on access and movement***

On November 15, 2005, Secretary of State Condoleezza Rice, appearing with European Union High Representative Javier Solana and Quartet Special Envoy James Wolfensohn at the David Citadel Hotel in Jerusalem, announced that "Israel and the Palestinian Authority have concluded an agreement on movement and access" following the Israeli withdrawal from Gaza. The announcement followed intensive, personal diplomacy by Secretary Rice with the parties in the region after their previous protracted efforts had failed to overcome differences. Excerpts from Secretary Rice's opening remarks describe the terms of the agreement. The full text of the press meeting is available at [www.state.gov/secretary/rm/2005/56890.htm](http://www.state.gov/secretary/rm/2005/56890.htm). The text of the agreement and Agreed Principles for Rafah Crossing are available at [www.state.gov/s/l/c8183](http://www.state.gov/s/l/c8183).

. . . Two months ago, Israel and the Palestinian Authority took an unprecedented step on the road to peace with the Israeli withdrawal from the Gaza Strip, returning control of that territory to the Palestinian people. Israeli and Palestinian leaders have been hammering out practical arrangements to gain the benefits of that withdrawal and improve conditions in the rest of the Palestinian territories.

I am pleased to be able to announce today that Israel and the Palestinian Authority have concluded an agreement on movement and access. The Quartet's Special Envoy Jim Wolfensohn has played a key role. . . . We also had important help from the Euro-

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pean Union and I am glad that Javier Solana can join us here today. The EU, as you will learn, will play an important role in implementing this agreement.\*

This agreement is intended to give the Palestinian people freedom to move, to trade, to live ordinary lives. The agreement covers six topics.

First, for the first time since 1967, Palestinians will gain control over entry and exit from their territory. This will be through an international crossing at Rafah, whose target opening date is November 25<sup>th</sup>.

Second, Israel and the Palestinians will upgrade and expand other crossings for people and cargo between Israel, Gaza and the West Bank. This is especially important now because Israel has committed itself to allow the urgent export of this season's agricultural produce from Gaza.

Third, Palestinians will be able to move between Gaza and the West Bank; specifically, bus convoys are to begin about a month from now and truck convoys are to start a month after that.

Fourth, the parties will reduce obstacles to movement within the West Bank. It has been agreed that by the end of the year the United States and Israel will complete work to lift these obstacles and develop a plan to reduce them.

Fifth, construction of a Palestinian seaport can begin. The Rafah model will provide a basis for planned operations.

Sixth, the parties agree on the importance of the airport. Israel recognizes that the Palestinian Authority will want to resume construction on the airport. I am encouraging Israel to consider allowing construction to resume as this agreement is successfully implemented—construction that could, for instance, be limited to non-aviation elements.

This agreement is a good step forward. With the international community, Israel and the Palestinian Authority must keep working hard to make these measures work in practice. As they are im-

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\* Editor's note: In the "Agreed Principles for Rafah Crossing," the European Union has the "authority to ensure that the PA complies with all applicable rules and regulations concerning the Rafah crossing point and the terms of this agreement."

plemented, trust can grow. Prime Minister Sharon and President Abbas have shown real statesmanship in making the decisions that led to this agreement.

Meanwhile, our commitment to security is strong, as always. Progress like today's agreement cannot continue unless there is also progress in fighting terror and obviously we all have a great interest in working together to ensure that anyone involved in criminal activities or violence will be prevented from passing through Rafah or any other crossing.

For our part, the United States will work closely with the parties to be sure that reliable security arrangements are in place.

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***c. Role of the United Nations***

In testimony before the House International Relations Committee, Subcommittee on the Middle East and Central Asia on April 20, 2005, Philo L. Dibble, Principal Deputy Assistant Secretary of State, Bureau of International Organization Affairs, testified on the Middle East and the United Nations. Excerpts below address the role of the United Nations in the Middle East peace process, including the role of Israel in UN bodies. The full text is available at [www.state.gov/p/io/rls/rm/45140.htm](http://www.state.gov/p/io/rls/rm/45140.htm).

Before discussing the UN's political role as a member of the Quartet, I would like to say a brief word about peacekeeping. United Nations peacekeeping missions remain a key aspect of UN involvement in the Middle East and play an important, stabilizing role. Specifically, the UN Disengagement Observer Force (UNDOF), in place since June 1974, has helped to de-escalate tension between Israel and Syria. The UN Truce Supervision Organization (UNTSO), in place since May 1948, with military observers from 23 nations, contributes to the overall stability in the region. And finally, the UN Interim Force in Lebanon (UNIFIL), in place since March 1978, is seen as a stabilizing influence in reducing tensions between Israel, Lebanon and Syria. The U.S. contributes to all of these operations through the international peacekeeping item in the budget. The

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FY06 request for UNDOF is \$8 million, and the request for UNIFIL is \$18 million.

The United Nations, along with the United States, the European Union and Russia, make up the Quartet. The Quartet's vision mirrors that of President Bush, i.e., two democratic states, Israel and Palestine, living side by side in peace and security. The Roadmap is the way to achieve that goal; it remains the international community's blueprint, endorsed by Israel and the Palestinians, for the way forward to achieving peace. Both sides have obligations under the Roadmap. The Quartet provides the framework for constructive involvement and engagement of the international community in the peace process.

The United Nations, through the UN Special Coordinator for the Middle East, also plays a key role in providing humanitarian assistance to the Palestinian people. For example, the UN Relief and Works Agency (UNWRA) is a UN agency charged with providing for basic education, health, and social services to Palestinian refugees in the West Bank, Gaza, Lebanon, Syria and Jordan. The United States is the largest national donor to UNRWA. The Department of State's Bureau of Population, Refugees and Migration has contributed \$349 million to UNRWA since 2003. In addition, USAID has given UNRWA \$37 million in grants since 2001.

It is important to say a word about the treatment of Israel in the UN General Assembly (UNGA), the Commission of Human Rights (CHR), and other, less formal UN-related groupings.

U.S. policy has long been that Israel should have the same standing and be able to play the same role as any other member state of the United Nations. As this Committee knows all too well, however, Israel has regularly been the target of unbalanced, one-sided resolutions in the UNGA and the CHR. In addition, because of the unwillingness of other member states to allow Israel to play its legitimate role as a member of one of the UN's regional groupings, Israel has not been able to enjoy the full scope for action that its UN membership should permit.

We have made redress of this unacceptable situation a top priority of our own diplomacy at the UNGA, the CHR and elsewhere. Those efforts have borne some fruit. For example, analysis of voting on the three key anti-Israel resolutions at the UNGA over the

past three years shows a trend away from Israel-bashing. But the percentage of votes in favor of these resolutions—still close to 60%—shows that there is still a long way to go and underscores the need to maintain an aggressive diplomacy with each new session.

Similarly, the U.S. has continued efforts to promote full and equal Israeli participation throughout the UN system. In particular, we have supported Israel's membership in the geographically-based consultative groups that are the organizing venues for action within the system. For example, intensive U.S. efforts led to Israel's being granted in 2000 full membership in the "Western Europe and Other Group" (WEOG) in New York for a period of 4 years. Because Israel was unable to obtain membership in the Asia Group—its geographic home—during that period, Israel's WEOG membership was extended for another four years in 2004.

Unfortunately, Israel's WEOG membership applies only to New York. It does not have the same level of participation in WEOG activities elsewhere, including, for example, at the Commission on Narcotic Drugs or the UN Environmental Program. We will continue our efforts to correct these anomalies.

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As to treatment of Israel and of Palestinian issues in UN bodies, *see, e.g.*, statement before the General Assembly, "The right of the Palestinian people to self-determination," adopted as Resolution 60/146, U.N. Doc. A/RES/60/146, available in U.N. Doc. A/60/PV.64 at p. 9 (Dec. 16, 2005); statements by Senator Rudy Boschwitz, head of the U.S. delegation to the UN Commission on Human Rights on Resolution 2005/6, "Israeli Settlements," and Resolution 2005/8, "Human Rights in the Occupied Syrian Golan," both available at [www.humanrights-usa.net/2005/0414Item8Israel.htm](http://www.humanrights-usa.net/2005/0414Item8Israel.htm), and on Resolution 2005/1, "Situation in Occupied Palestine," available at [www.humanrights-usa.net/2005/0407EOVL5.htm](http://www.humanrights-usa.net/2005/0407EOVL5.htm); and statement by Ambassador Ellen Sauerbrey, U.S. Representative to the Commission on the Status of Women, on Resolution on the situation of and assistance to Palestinian women at the 49th session of the Commission on the Status of Women, March 11, 2005, available at [www.un.int/usa/05\\_058.htm](http://www.un.int/usa/05_058.htm).

## 2. Sudan

### a. *Comprehensive Peace Agreement*

On January 9, 2005, then Secretary of State Colin L. Powell signed as witness to the Sudan Comprehensive Peace Agreement to resolve the North-South conflict. Secretary Powell's remarks at the time welcoming the agreement are excerpted below and available at [www.state.gov/secretary/former/powell/remarks/2005/40468.htm](http://www.state.gov/secretary/former/powell/remarks/2005/40468.htm).

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At the outset of his administration, President Bush set as his top priority in Africa ending the tragic civil war in Sudan. Today, we declare an end to that war, and the beginning of a peace. This accord ends more than two decades of conflict. It can close a dark chapter in the history of Sudan and open the door to a promising future for all Sudanese. Sudan can now become an example of reconciliation. It can demonstrate to the world that even the most intractable conflicts can be resolved.

These were difficult negotiations and many have made enormous contributions—in particular, the Inter-Governmental Authority on Development and the Government of Kenya. All of us owe General Sumbeiywo a great debt of gratitude for his extraordinary efforts. I am pleased that the United States, the United Kingdom and Norway were able to support this African-led process.

In September 2001, President Bush appointed Ambassador John Danforth as Special Envoy for Sudan. The president's instructions were to spare no effort. The president stayed personally involved to ensure our efforts in Sudan had the administration's highest level attention. I want to express my appreciation for the vital contributions of Ambassador Danforth, and for those of our Special Humanitarian Coordinator Andrew Natsios and my entire Africa team.

Above all, I salute President Bashir, Vice President Taha, and Chairman Garang for their persistence, dedication and statesmanship. They now share an enormous responsibility. The people of



Sudan expect a lasting peace—a peace that brings democracy and prosperity to a unified country. The United States pledges our full support as you go about this historic task. And there is much to do.

The world must stay closely engaged with Sudan in the hard work of reconstruction. The National Congress Party and the Sudan People's Liberation Movement must act quickly to build on the goodwill and momentum of this bright day. These new “partners for peace” must work together immediately to end the violence and atrocities in Darfur—not next month or in the interim period, but right away, starting today. The United States and the world community expect the new partners to use all necessary means to stop the violence. And we expect to see rapid negotiation of the crisis in Darfur.

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In a briefing on January 12, 2005, Charles R. Snyder, Senior U.S. Representative on Sudan, addressed the press at the Department of State in Washington, D.C. Excerpts from Mr. Snyder's opening remarks follow. The full text is available at [www.state.gov/p/af/rls/rm/2005/40966.htm](http://www.state.gov/p/af/rls/rm/2005/40966.htm).

Let me just make a few opening remarks about what happened last Sunday in Nairobi and the signing of the Comprehensive Peace Accord ending a 21-year civil war in which 2.2 million people were killed, millions dislocated. But more importantly, what it means to the ongoing crisis in Darfur.

I know we've been saying a lot about how this peace agreement can inform and perhaps expedite a political solution in Darfur, which is the ongoing crisis; and I'll make a few comments about that relationship just to give you an idea why we've been saying that. But let me start with the Comprehensive Peace Act.

What it does, essentially, is share power in a federal system for the first time in Sudan in which wealth as well as power is deliberately subdivided. The deal is deliberately subdivided. The deal is that the south will get 50 percent of the oil revenues in addition to 50 percent of the general governmental revenues. And so for the first time with a federal system that on paper has existed once or twice before in Sudan, . . . the southern government will have access

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to funds to run programs. That's part of a nationally coherent program. But nonetheless, the money will flow directly to them and they can spend it according to what their judgment is of the most pressing needs of the people of the south.

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The Peace Agreement is not just about the north and south, which is why we've been trying to say all along that the element of a political solution for Darfur [is] in there as well. Because if you look at what the rebel demands are in the west of the country, in Darfur, they're typically demands of the marginalized populations anywhere against the center, which has dominated power, wealth and everything else in the country for a long time. And that's really what the north-south agreement is about. The south was marginalized, if you want to put it in political science terms. That's what's happened in Beja, where that has been some trouble in the east.

And so this agreement and the structure it takes, a federal state in which power is shared and wealth is shared, is the shortcut to a rapid solution in Darfur. Is it 100 percent of the solution? Obviously not—there are different needs in different places. But it's probably 90 percent of the solution.

Among other things, it will give some security to the rebels who make an agreement in Darfur that another, fellow rebel, until very recently, John Garang and his party, will sit in the central legislature with 30 percent of the seats. They will also sit in the south with a relatively autonomous government that will have its own army to protect it, at least in the beginning; and in which there will be a large United Nations peacekeeping force. This process will work out over the next several weeks in New York in terms of the size of the force, but the tentative planning is talking about 8- to 10,000 men, so a sizeable north-south peacekeeping force.

But much more importantly, it's the transformation of the central government. With President John Garang there, a successful rebel, now, who's negotiated a good deal, for not just himself, but for the rest of the country, should be a transformational character. He's developed a partnership over time with the Vice President who will remain on, Ali Osman Taha, which says that we may get a dynamic situation that looks at development of the whole country as well if

this partnership can proceed forward. And that's what we're hoping to do.

One of the things that senior American officials did who were present in Nairobi: Secretary Powell, Jack Danforth and others, was to press the two parties not to rest on their laurels—to celebrate peace, yes, on Sunday, but then to go around and see if they couldn't, together, reach out to the rebels in Darfur and propose a way forward; and we're reasonably assured, after a few days' rest from the hard work they have done, they will begin that effort.

President Bashir, for instance, announced that he has now empowered Vice President Taha to be the peacemaker in Darfur. This is a good step in the right direction. So we're hopeful that, as I said, this historic peace agreement, which got very little notice, I think, because of the problems in Darfur, may be the nugget of the solution in Darfur.

What happens next, in terms of the process? Inside the north-south agreement, the key thing is to enshrine the provisions of federalism, power-sharing, wealth-sharing into the constitution. Constitutional committees will meet, starting next week and we hope, within six to eight weeks, according to the timetable the parties themselves have set, will enshrine in an interim constitution the changes that are necessary to put into action the north-south peace agreement. And these changes, as I pointed out earlier, will not just apply to the north-south; they'll apply to the entire country.

Another feature that's been agreed to, or at least put on the table by the government of Khartoum, is a willingness to put a north—a Nuba Mountain-style ceasefire in place in Darfur. That was one of the early steps that Jack Danforth succeeded in getting. One of his so-called four tests was a ceasefire to take place in one of these marginalized areas, a northern area, the Nuba Mountains, not part of the traditional south.

That ceasefire, since Jack Danforth put it forth to the test, has held successfully. It's not the standard ceasefire in which a large separation of forces, a large number of peacekeepers, are put in place, but rather one that demonstrated the parties were successful in confining themselves in the areas that were identified. That offer is on the table.

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We're hopeful that when the process on Darfur reconvenes in Abuja in late January, that the rebels will take a hard look at that hard offer, a combination of the Nub[a] Mountain-style ceasefire, the presence of a large number of African Union monitors and the political framework outlined in this north-south settlement holds the promise, provided the rebels can be comforted and assured that the international community will stand with them, of moving this whole process forward rapidly; and we're looking forward to that happening.

What are the other mile markers in the north-south agreement? When will John Garang enter the new government? The key to that, again, is the ratification of the constitutional amendments. Again, I said that we were hoping it would take six to eight weeks. That's the schedule they've agreed to. They're looking to a period of two weeks after that, in which the assemblies, one in the north and one in the south will ratify the proposed changes to the constitution.

And it's at that point that John Garang will officially become a member of the government. He's already an ex-officio member, and there are talks about him being present to help in the Abuja negotiations. But that will be the actual moment at which this transition government begins to take place. By the end of the pre-interim period, which is the so-called first six-month period, governmental selections in other places will have been made, and a full-up transitional government will be in place.

What do I mean by governmental selections? Some of the finer points also have the Walis, the governors, in various provinces being appointed either by the southern leadership or by the northern leadership, or in the case of the Nuba Mountains, in concert with each other. There were other details like that. There will be a provincial legislature set up. So all that's supposed to take place in that first six-month period. That's what happens in the pre-interim period.

The six-year period after that is the run-up to two events of major consequence: At the four-year point, they have agreed that they will hold nationwide elections at the provincial level, as well as for the national legislature on other positions. They will, at that point, open the political system for the first time to true competition. And that's the point at which the Darfurian rebels and other

marginalized people will be given the chance to demonstrate their practical political power in what we hope will be an open process.

Why four years? The country is basically destroyed. There needs to be political party building in the more marginalized areas. The traditional northern parties will be back and active quite soon, I suspect, the DUP and the UMA party being the two largest. Some are members of the so-called National Democratic Alliance. The Beja congress and others will be more than welcome to come back and begin to set up the political structures for this competition four years in.

The second major event in this period, of course, at the end of this, there is supposed to be a referendum in which the south will get to say whether or not it chooses to remain part of Sudan. We are hoping, I think the neighbors are hoping, the international community is hoping that after six years of demonstrating that this really is over, there is reconciliation, there is federal power, the south will respect that as well as other marginalized areas that they'll make the choice to remain in a unified Sudan. That's the other major event, that six-year election.

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On July 9, 2005, Sudan adopted its Interim National Constitution and inaugurated the new Presidency of the Government of National Unity at the end of the pre-interim period under the Comprehensive Peace Agreement. A press statement released on July 10, 2005, by Department of State Spokesman Sean McCormack is excerpted below and available at [www.state.gov/r/pa/prs/ps/2005/49114.htm](http://www.state.gov/r/pa/prs/ps/2005/49114.htm).

The United States congratulates the leaders and people of the Republic of Sudan on the inauguration of the new Presidency of the Government of National Unity (GONU) on July 9 and the entering into force of the new interim constitution. Deputy Secretary of State Robert B. Zoellick represented the United States at the inauguration, describing it as an important step toward peace and reconciliation in a unified, democratic Sudan. At the same time, Deputy Secretary Zoellick emphasized that it is equally important

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for the new GONU to address the tragedy in Darfur and the challenges of peace and development throughout all of Sudan.

The United States congratulates Dr. John Garang on his becoming Sudan's First Vice President and Ali Osman Taha as Vice President. Their leadership and commitment resulted in the Comprehensive Peace Agreement that ended 21 years of civil war between North and South Sudan. We recognize the support of President Bashir for the peace process.

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The GONU and interim constitution are the culmination of complex negotiations mediated by the Intergovernmental Authority on Development and supported by the United States, led by Ambassador and former Senator Jack Danforth, and America's Troika partners, the United Kingdom and Norway, as well as the United Nations and others around the world.

As the Deputy Secretary stated in Oslo earlier this year, the United States is strongly committed to implementation of the Comprehensive Peace Agreement. During his third visit to Sudan on July 8-9, the Deputy Secretary again visited Darfur, where he met with non-governmental organizations providing relief, African Union peacekeeping troops, and SLM rebel commanders. In Khartoum, he also met with Vice Presidents Garang and Taha, UN Secretary General Kofi Annan, the Secretary General's Special Representative for Sudan Jan Pronk, and Presidents Museveni and Kibaki of Uganda and Kenya, respectively. The Deputy Secretary urged the parties to seize the opportunity of the creation of the GONU to maintain momentum toward peace throughout the country. He emphasized the importance of an inclusive process, including addressing the situation in the east. The Deputy Secretary urged immediate steps to end violence, support humanitarian and AU operations, and achieve a political settlement in Darfur.

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Vice President Garang was killed in a helicopter crash on July 30, 2005. A team from the U.S. National Transportation Safety Board participated in the international investigation of the crash's causes; at the end of 2005 that investigation was

not yet completed. Although Vice President Garang's death slowed implementation of the Comprehensive Peace Agreement, his deputy, Salva Kiir, took his place. In September 2005 Sudan established a coalition government of National Unity.

In October 2005 a regional Government of Southern Sudan was established with Mr. Kiir as president. On December 5, 2005, the Southern Sudan constitution was signed. A press statement released by State Department Deputy Spokesman Adam Ereli on December 7, 2005, welcomed these developments and other progress in implementation of the Comprehensive Peace Agreement and urged a political solution for Darfur. The full text of the press statement, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/57777.htm](http://www.state.gov/r/pa/prs/ps/2005/57777.htm).

The United States congratulates Salva Kiir and the people of Southern Sudan on the signing of the Southern Sudan constitution on December 5, 2005. This is a step forward in Sudan's political process and the implementation of the Comprehensive Peace Agreement. The Comprehensive Peace Agreement remains the key to Sudan's future. It provides the framework and basis for power sharing, wealth sharing, and regional security, all of which are applicable to every area and every citizen of Sudan.

There has been marked progress towards peace and reconciliation in Sudan since the signing of the Comprehensive Peace Agreement on January 9, 2005, including the establishment of the Government of National Unity, the Interim National Constitution and the Government of Southern Sudan. In addition, the Assessment and Evaluation Commission has been established, which will oversee implementation of the peace accords. The National Democratic Alliance, an umbrella organization of northern opposition parties also has joined the Government of National Unity.

The United States continues to seek a peaceful and democratic Sudan. We remain concerned by the continued violence in Darfur and have stressed to Sudanese leaders that this violence must end. We will continue to press for a political solution in Darfur. We believe that such a solution will hold all parties accountable for their actions, ensure that people can return home in a safe and secure environment, and build a lasting and just peace for all Sudanese. We

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are providing strong support for the African Union-mediated talks in Abuja, Nigeria, in order to achieve a settlement expeditiously.

On March 24, 2005, the Security Council adopted Resolution 1590 establishing the United Nations Mission in Sudan ("UNMIS"), discussed in B.1. below.

### ***b. Darfur***

On July 6, 2005, the United States welcomed the signing of a Declaration of Principles on Darfur. A press statement released by Spokesman Sean McCormack noted that a U.S. observer team "play[ed] a key role in supporting the efforts to achieve the Declaration of Principles." The press statement, excerpted below, is available at [www.state.gov/r/pa/prs/ps/2005/48987.htm](http://www.state.gov/r/pa/prs/ps/2005/48987.htm).

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The United States congratulates the parties on their signing of the Declaration of Principles for the Resolution of the Sudanese Conflict in Darfur. We welcome the agreement of the Government of Sudan, Sudan Liberation Movement, and the Justice and Equality Movement to the declaration's 17 points that now provide a framework for negotiations on wealth and power-sharing as part of a Darfur political settlement. We urge the parties to undertake these negotiations quickly in order to achieve peace and reconciliation in Darfur.

The United States commends the African Union for the pivotal role it played in successfully mediating the talks in order to achieve the Declaration of Principles. . . .

The Declaration of Principles should serve as the basis for further good-faith political dialogue between the parties. We urge them to adhere to their previous cease-fire, humanitarian, and security commitments. We call on them to follow through with their recognition that the current conflict in Darfur can only be resolved through peaceful means. There must be an immediate end to the use of violence by all groups in Darfur.



As we have repeatedly pointed out, the crisis in Darfur and implementation of the Comprehensive Peace Agreement are inter-related issues. Taken together, the Declaration of Principles and the planned July 9 installation of the presidency of the Government of National Unity constitute significant progress toward the goal of achieving peace throughout Sudan. The July 8-9 visit of Deputy Secretary Zoellick underscores the continuing commitment of the United States to support these efforts.

On March 29, 2005, the Security Council, acting under Chapter VII, adopted Resolution 1591 in which it decided to establish a committee to monitor implementation of paragraphs 7 and 8 of Resolution 1556 (2004), which imposed an arms embargo with respect to "all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur." Paragraph 3 of Resolution 1591 also established measures to be imposed on individuals designated by the Committee "who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the measures implemented by Member States in accordance with paragraphs 7 and 8 of resolution 1556 (2004) and paragraph 7 of this resolution as implemented by a state, or are responsible for offensive military overflights described in paragraph 6 of this resolution. . . ." The measures include prevention of entry into or transit through the territories of member states and an assets freeze.

In paragraph 7 of Resolution 1591 the Security Council decided that measures imposed by paragraphs 7 and 8 of resolution 1556 "shall immediately . . . also apply to all the parties to the N'djamena Ceasefire Agreement and any other belligerents in the states of North Darfur, South Darfur and West Darfur," with certain exceptions including support of implementation of the Comprehensive Peace Agreement.

On March 29, Ambassador Stuart Holliday, Alternate U.S. Representative to the UN for Political Affairs, spoke with reporters on the adoption of Resolution 1591, as excerpted below. The full text is available at [www.un.int/usa/05\\_053.htm](http://www.un.int/usa/05_053.htm).

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... We're pleased that 12 members of the Council voted today to adopt this resolution (1591), which we hope will put the appropriate pressure on all the parties of the Darfur conflict to end this tragic chapter. We expect that the parties to the Abuja process will be spurred into reaching an agreement, particularly the offensive flights we've seen over the last several months will be curtailed.

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... [W]e've always said, and the resolution says that we'll consider measures, article 41 measures, at any time. I think that we also have to recognize that there will be a new government. There is a wealth-sharing agreement that is in place that involves, of course, the revenue from that sector. So what we're trying to do is apply constructive pressure on Darfur specifically in a way that will actually curtail the violence.

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We've had a number of resolutions on Darfur, two specifically. We've had a resolution on the North-South process. We've always said we'd consider further measures; we've actually enacted them today. What we've done is establish an arms embargo that extends to the government of Sudan. Previously we had an arms embargo on non-state actors in Darfur. So we're taking a comprehensive look at any arms that come into Darfur. If the government of Sudan would like to come into Darfur for any purpose, for any military purpose, it has to get the permission of the Security Council and that has to be through the Council's committee that has been established by this resolution. There's also a panel of experts that will be instituted to work with the Council and look at violations, the names of individuals who are named as violators. The penalties would include both a travel ban and an assets freeze. We've also linked ... the offensive military flights to those sanctions. In essence that's what we've sought to do. And we've said that we would review this regime in 12 months. We also will likely take a look at it at some point after the creation of the new government of national unity.

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*See also* March 31, 2005, statement in the Security Council by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, addressing Resolutions 1590, 1591, and 1593 on Darfur, available at [www.un.int/usa/05\\_055.htm](http://www.un.int/usa/05_055.htm). Resolution 1590, establishing a peacekeeping mission, is discussed in B.1. below; Resolution 1593, referring the situation in Darfur to the International Criminal Court, is discussed in Chapter 3.C.2.a.(1).

### 3. Lebanon

On September 2, 2004, the UN Security Council adopted Resolution 1559. U.N. Doc. S/RES/1559 (2004). On April 26, 2005, the Secretary-General provided his first semi-annual report to the Security Council on the implementation of that resolution. U.N. Doc. S/2005/272, available at <http://documents.un.org>. As summarized in the Secretary-General's report, in Resolution 1559 the Security Council

- (a) Called upon all remaining foreign forces to withdraw from Lebanon;
- (b) Called for the disbanding and disarmament of all Lebanese and non-Lebanese militias;
- (c) Supported the extension of the control of the Government of Lebanon over all Lebanese territory;
- (d) Declared its support for a free and fair electoral process in Lebanon's then upcoming presidential election, conducted according to Lebanese constitutional rules devised without foreign interference or influence.

In a statement by the President of the Security Council, issued May 4, 2005, the Security Council, among other things, acknowledged "the letter of 26 April 2005 from the Minister for Foreign Affairs of the Syrian Arab Republic to the Secretary-General stating that Syria has completed the full withdrawal of its forces, military assets and the intelligence apparatus from Lebanon." U.N. Doc. S/PRST/2005/17 (2005), available at <http://documents.un.org>. Excerpts follow from remarks to the press on that date by Anne W. Patterson,

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Acting U.S. Representative to the United Nations. The full text of Ambassador Patterson's remarks is available at [www.un.int/usa/05\\_091.htm](http://www.un.int/usa/05_091.htm).

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Well, let me first say that we're quite pleased with the presidential statement that was just passed by the Council. It took several days to negotiate with interested delegations. And I think it recognizes the partial implementation of 1559, with the partial withdrawal of the Syrians from Lebanon; but it also makes clear that a lot more needs to be done to implement 1559, particularly the free and fair Lebanese elections and the disarming of the militia. But still it's a very positive interim step. . . .

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It was actually in the final analysis not all that difficult to agree on the text because there was widespread agreement in the Council that 1559 has been very successful in persuading the Syrians to withdraw their troops and also enabling the—setting up the environment in which free and fair Lebanese elections could take place. But it's important that the Council maintain momentum, another way to put it is to maintain pressure, and again to not only recognize what has happened so far, but to also look forward to the other parts of 1559. And I stress again that the other parts of 1559 remain to be implemented. . . .

In remarks to the Security Council on July 21, 2005, U.S. Political Counselor William Brencick provided the views of the United States on the situation in the Middle East. Excerpts below address the situation in Lebanon. The full text of Mr. Brencick's remarks is available at [www.un.int/usa/05\\_138.htm](http://www.un.int/usa/05_138.htm). See also discussion of Resolution 1595 in Chapter 16.A.2.

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Turning to the situation in Lebanon, we urge the new Lebanese government to move toward full implementation of UNSCR 1559, including militia disarmament. Our position on Hizballah has not changed. It is a designated foreign terrorist organization and can-

not play a role as a legitimate political actor until it renounces violence and disarms. The recent violent events initiated by Hizbollah along the blue line on June 29 and July 12 underscore the danger this militia poses to international peace and security.

Mr. President, we are also deeply concerned about Syria's closure of its border with Lebanon. Though we welcome legitimate efforts to interdict illicit trade and the movement of terrorists and their assets, the severity of this effort clearly illustrates an ulterior motive on the part of the Syrians. This is clearly an attempt by the Syrian government to strangle the economy of Lebanon by impeding trade across their border, which is Lebanon's gateway to the rest of the Arab world, and a means of continuing to interfere in Lebanese affairs.

This situation underscores the need for the two governments to establish normal and sovereign relations between themselves in order to resolve problems such as this one. At the same time, this is an issue that is affecting Lebanon's trade with other Arab nations and we would expect that they would also make their views known to the Lebanese and Syrian governments.

This is yet another example of Syria interfering in Lebanon. The Syrian government is signaling not only to the Lebanese, but to the rest of the world, that it is still trying to call the shots there.

#### **4. Cote d'Ivoire**

In a press statement of April 7, 2005, by Department of State Spokesman Richard Boucher, the United States welcomed an agreement reached on April 6 in Pretoria, South Africa, "establishing a new plan for achieving a peaceful solution to the ongoing crisis in Cote d'Ivoire":

We commend the mediation efforts of South African President Mbeki on behalf of the African Union. We call upon all the parties to the agreement to fully honor these new commitments, as well as meet their continuing responsibilities under the Linas-Marcoussis and Accra III

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Accords.\* A rededication of effort toward disarmament, reunification of the country, and genuine reconciliation will enable Ivoirians to move forward to free and fair elections with the oversight and participation of the international community.

The full text is available at [www.state.gov/r/pa/prs/ps/2005/44427.htm](http://www.state.gov/r/pa/prs/ps/2005/44427.htm); see also statement in the Security Council on April 26, 2005, by Reed Fendrick, Minister Counselor for Political Affairs, available at [www.un.int/usa/05\\_081.htm](http://www.un.int/usa/05_081.htm). An agreement on disarmament, demobilization and reintegration ("DDR") and on the restructuring of the armed forces was signed on May 14, 2005, in Yamoussoukro by the chiefs of staff of the National Armed Forces of Cote d'Ivoire ("FANCI") and the armed forces of the Forces Nouvelles ("FAFN"). See Security Resolution 1603, U.N. Doc. S/RES/1603 (June 3, 2005).

### 5. The Balkans

During 2005 the United States was actively engaged in efforts to launch final status talks for Kosovo. In testimony before the Senate Committee on Foreign Relations on November 8, 2005, Under Secretary of State for Political Affairs R. Nicholas Burns discussed U.S. views on Kosovo and on other issues related to maintaining the peace in the Balkans. Mr. Burns' statement, "Hearing on Kosovo: A Way Forward?", is excerpted below and available at [www.state.gov/p/us/rm/2005/56602.htm](http://www.state.gov/p/us/rm/2005/56602.htm). See also testimony by the Under Secretary before the House Committee on International Relations, "Kosovo: Current and Future Status," available at [www.state.gov/p/us/rm/2005/46471.htm](http://www.state.gov/p/us/rm/2005/46471.htm) and statement by Ambassador Stuart Holliday, Alternate U.S. Representative to the United Nations for Special Political Affairs, in the Security Council on May 27, 2005, at [www.un.int/usa/05\\_109.htm](http://www.un.int/usa/05_109.htm).

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\* Editor's note: The references are to the agreement signed by the Ivoirian political forces in Linas-Marcoussis on January 24, 2003 (S/2003/99) approved by the Conference of Heads of State on Côte d'Ivoire, held in Paris on 25 and 26 January 2003, and the Agreement signed in Accra on 30 July 2004.

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As the history of the last 15 years has demonstrated, the U.S. has an abiding interest in the Balkans. . . . Without stability in the Balkans, we will never see a united, peaceful Europe that can be a true partner for the U.S. in promoting democracy throughout the world. It is now time to finish the job.

The Balkans region will not be stable, however, as long as Kosovo remains in a state of political suspended animation. The history of the past decade tells us that the United States is indispensable to stability in the Balkans. We must continue to play this key role as we look to support the process that will determine Kosovo's future status. . . .

2006 will be a crucial year of decision for Kosovo and the Balkans. The UN-sponsored Final Status Talks will begin in a few weeks time, and after more than six years of UN rule, it is time for the people of Kosovo—Albanian and Serb alike—to be given a chance to define their future. Our partners in the Contact Group—the EU, France, Germany, Italy, Russia and the United Kingdom—agree with us that the status quo in Kosovo is neither sustainable nor desirable. Earlier this year, the U.S. led the way to convince the UN to initiate a review of its Standards, conducted this summer by Norway's able Ambassador to NATO, Kai Eide. The report concluded that further progress on these issues is unlikely until there is greater clarity about Kosovo's future status. UN Secretary-General Kofi Annan recommended beginning negotiations to determine Kosovo's future status, a recommendation the Security Council endorsed on October 24. . . .

\* \* \* \*

We understand that diplomatically, this will be tough going. The parties to the talks—the Kosovar Albanians, Kosovar Serbs and the government of Serbia-Montenegro—will see their vital interests at stake. We expect them to participate constructively and to restrain more extreme groups from using violence to gain political ends. Although we will be working for a peaceful settlement, NATO troops will have to be ready to defuse potentially violent situations.

### Elements of a Settlement

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The United States will not support a specific outcome at this stage. It is important that we and our allies remain neutral, because the future of the province is the sole responsibility of the Albanian and Serb people of Kosovo and the Government of Serbia and Montenegro. But the final result should respect the basic facts of Kosovo today—90 percent of the people are ethnic Albanians who were treated cruelly, even viciously, by the government of Slobodan Milosevic. They deserve to live in security and peace. The Kosovo Serb population also needs to be assured that they have a future there and that their churches and patrimonial sites will be respected.

\* \* \* \*

. . . There is already agreement that Kosovo will be self-governing in some form, that it will also remain multi-ethnic and will protect the cultural heritage of all its inhabitants. The U.S. will continue to work to ensure these concepts are incorporated into Kosovo's future status, because to make a political determination without these principles would leave the door open to future conflict and put at risk the war we fought to prevent ethnic cleansing and the strenuous efforts our diplomats and soldiers have made to keep the peace.

As with any process of negotiation, neither side will get everything it wants. To reach a lasting result, both will sometimes be required to make compromises that may seem to violate important interests in the cause of peace. In Kosovo, we face an unprecedented challenge of trying to build stability after a NATO intervention led to the end of government structures that had served to repress, rather than protect, the majority of the population. For six years, the UN has exercised the functions of a government, but, as foreseen by UN Resolution 1244 in 1999, the time has come to enable Kosovo's people to govern themselves consistent with the outcome of the status process to come.

Mr. Chairman, the U.S. and its European allies have decided on several guiding principles that must shape the process of determining a future status for Kosovo and guide the work of the Special Envoy. We have made clear that a return to the situation before 1999



is unacceptable and that there should be no change in existing boundaries of Kosovo, and no partition. Other principles for a settlement include full respect of human rights, the right of refugees and displaced persons to return to their homes, the protection of cultural and religious heritage and the promotion of effective means to fight organized crime and terrorism. The Contact Group agreed to exclude those who advocate violence and that, once begun, the status process must continue without interruption.

We will ensure that the result of the process meets three key criteria:

First, it must promote stability not only in Kosovo, but throughout Southeast Europe.

It must also provide full democratic rights for all people, especially minorities.

Finally, it must further the integration of the region with the Euro-Atlantic mainstream.

\* \* \* \*

### **Our Message to Kosovo Albanians**

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I made clear to [the Kosovo Albanian Team of Unity] that independence must be earned. First, Kosovo must continue to develop a functional, democratic government that can safeguard the rule of law. Second, there must be generous provisions for the security of minorities, including decentralized authority. Finally, Kosovo must be able to assure its neighbors that it will not export instability. The UN standards define the goals Kosovo should achieve in preparing for self government. Kosovo's progress in implementing these standards will be the ultimate measure of how well it makes its case.

\* \* \* \*

. . . NATO acted in 1999 to prevent the ethnic cleansing of more than one million Kosovo Albanians and it would be a tragic irony if Albanians themselves now tried to inflict a policy of retribution and intimidation against their Serb minority. The U.S. and its allies will simply not tolerate such an outcome. They should also apprehend and punish those responsible for hate crimes committed

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against minorities in March 2004. They should state publicly that the independence they seek is only for Kosovo, without any changes to its present boundaries. No country, including the U.S., is prepared to support an irredentist “Greater Albania” or an independent Kosovo that aspires to exceed its present borders.

\* \* \* \*

I warned them that an attempt by either side to use violence as a political tactic during the negotiation will be put down swiftly and firmly by NATO. Whatever the settlement of Kosovo’s political status, it must remain multi-ethnic, and Serbs and Albanians need to work to create conditions under which they will be able to live together peacefully.

\* \* \* \*

### Our Messages to the Serbs

The Kosovo Serb community, and indeed the government of Serbia and Montenegro, must also assume a heavy share of responsibility for successful negotiations. When I met with Kosovar Serb leaders in October, I urged them to become more involved politically in Kosovo itself. Serbs have told me they would prefer local autonomy for themselves in Kosovo. If this is so, it is in their own interest to participate in the institutions of local government that will be responsible for a future Kosovo. By refusing to participate in elections and in the Kosovo Assembly, Kosovo Serbs are missing a chance to have a say in Kosovo’s future.

Belgrade must also help Kosovo’s Serbs ensure that they will have a place in whatever political structure emerges. . . . As Kosovo will remain multi-ethnic, it will retain important connections with Serbia regardless of its political status. . . . Whatever Kosovo’s future will be, Belgrade can best protect the interests of Serbs by encouraging them to participate in politics and begin to integrate themselves with their Kosovo Albanian neighbors.

### Overall American Engagement in the Balkans

Mr. Chairman, while Kosovo’s future status is the most serious issue to be resolved in Southeast Europe in 2006, there are three

other issues that will also be important to building the stability and peace we seek for the region:

First, there will be no real peace in the Balkans until the countries of the region bring the most notorious war criminals to justice. Ten years after the massacre at Srebrenica, the two Serb leaders directly responsible remain at large. . . . The U.S. has been clear that Belgrade must comply with its obligations to the International Criminal Tribunal for the Former Yugoslavia. Until the government turns over indicted mass murderer Ratko Mladic to the Hague, the U.S. will not agree to Serbia and Montenegro's participation in NATO's Partnership for Peace. . . . Of course, the United States also remains determined to see Radovan Karadzic and Ante Gotovina brought to justice in The Hague, and we will continue pressing all concerned parties to see justice done.

Beyond a settlement in Kosovo and the arrest of the remaining war criminals, there is another diplomatic hurdle to a peaceful stable Balkans region in the future: a more unified Bosnia-Herzegovina. Ten years ago this month in Dayton, Ohio, the United States negotiated an end to the brutal war in Bosnia and Herzegovina. . . .

The Dayton Accords were never meant to be set in stone. The people of Bosnia and Herzegovina have already recognized the need for reform if they are to join NATO and the EU. Just before my visit to Sarajevo in October, the Bosnian parliament voted overwhelming to create a single, unified army and defense ministry—for the 10 years since Dayton, there have been two of each. They also agreed on the need to reform their police institutions consistent with EU standards, which has enabled the European Union to recommend launching negotiations on a Stabilization and Association Agreement with Bosnia-Herzegovina this year.

When the Bosnian leadership comes to Washington in two weeks, we will be asking them to embrace an even more ambitious vision—erasing major political divisions by agreeing to a single Presidency, a stronger Prime Ministership and a reformed Parliament. . . .

There is another issue that demands our attention in the Balkans, the status of Montenegro. The United States supports the Belgrade Agreement and the Serbia and Montenegro Constitutional Charter: documents that present the opportunity for either republic to hold a referendum on leaving the state union. The United States

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will support whatever solution the two republics agree on through democratic means, whether that is union or independence. Montenegrin officials have indicated their desire to hold a referendum in 2006 on independence. I told President Djukanovic last month that any referendum must be held peacefully, and as the result of a process that all sides accept as legitimate. The overarching U.S. goal is reform and progress toward Europe for both Serbia and Montenegro, in or outside the state union.

\* \* \* \*

On December 19, 2005, Secretary of State Rice appointed Ambassador Frank G. Wisner as Special Representative to the Kosovo Status Talks, stating:

Ambassador Wisner will provide American support to the lead international negotiator, UN Special Envoy Martti Ahtisaari, in his efforts to bring together Serbian and Kosovar leaders for discussions on Kosovo's future status. . . .

. . . With our Contact Group partners and in support of the U.N. Special Envoy's efforts, the United States will seek to secure a settlement on Kosovo's status that promotes security for all peoples of the Balkans and advances the region's integration with Euro-Atlantic institutions.

The full text of Secretary Rice's statement is available at [www.state.gov/secretary/rm/2005/58288.htm](http://www.state.gov/secretary/rm/2005/58288.htm).

### B. PEACEKEEPING AND RELATED ISSUES

#### 1. Sudan

On March 24, 2005, the Security Council adopted Resolution 1590, establishing the United Nations Mission in Sudan ("UNMIS") for an initial period of 6 months, to consist of 10,000 military personnel and "an appropriate civilian component including up to 715 civilian police personnel." U.N. Doc. S/RES/1590. The resolution gives UNMIS a mandate, inter alia, to support implementation of the Comprehensive Peace Agreement signed on January 9, 2005, between the Government of Sudan and the Sudan People's Liberation

Movement/Army, ending the so-called “North-South” conflict in Sudan. *See* A.2.a, *supra*. Paragraph 16 of the resolution provides that the Security Council, acting under Chapter VII, decided in part:

that UNMIS is authorized to take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities, to protect United Nations personnel, facilities, installations, and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers, joint assessment mechanism and assessment and evaluation commission personnel, and, without prejudice to the responsibility of the Government of Sudan, to protect civilians under imminent threat of physical violence;

Ambassador Stuart Holliday, Alternate U.S. Representative to the UN for Special Political Affairs, welcomed the resolution, stating:

... [T]he United States is pleased that the Security Council today unanimously adopted a resolution (1590) that is one part of the Council's ongoing efforts to address the peace and stability in the Sudan. Much more work needs to be done, there are critical issues that remain on the table. We hope that this resolution will help consolidate the North-South peace accord that was an achievement signed in Nairobi, actually witnessed by the Security Council. The North-South Agreement, of course, brings to an end the civil war, which claimed many lives and has torn the country apart. We remain very concerned and disturbed by the situation in Darfur, in the western part of the country. And we will continue working with our Council colleagues to address that important question in the days ahead.

The full text of the statement is available at [www.un.int/usa/05\\_050.htm](http://www.un.int/usa/05_050.htm).

Resolution 1627, U.N. Doc. S/RES/1627, adopted on September 23, 2005, extended the mandate of UNMIS through

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March 24, 2006. The United States maintained a Civilian Protection Monitoring Team through October 2005.

### 2. Middle East

*See statement in A.1.c. supra.*

### 3. Peacekeeping Reform

#### a. Review of UN peacekeeping

##### (1) Comprehensive review

On October 25, 2005, Thomas W. Ohlson, U.S. Advisor on UN Peacekeeping, addressed the General Assembly Fourth Committee (Special Political and Decolonisation), calling for a full and comprehensive review of UN peacekeeping. The full text of Mr. Ohlson's statement, excerpted below, is available at [www.un.int/usa/05\\_187.htm](http://www.un.int/usa/05_187.htm).

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... [T]he time has come to reexamine how we conduct UN peacekeeping. We believe a full and comprehensive review of UN peacekeeping should be initiated as soon as possible, with a particular emphasis on moving stalemated or static post-conflict situations toward resolution. If a peacekeeping operation does not appear to be advancing resolution of the issues, then we need to explore alternatives and at least consider scaling back or otherwise restructuring those missions.

... If we determine that missions are contributing to stalemate, we need to look for ways to invigorate the peace process or to begin moving these peacekeeping operations toward drawdown.

Today's increasingly multi-dimensional peacekeeping operations are far too expensive in both human and financial terms to undertake without a clear exit strategy in place from the beginning. As soon as possible after the active phase of conflict has been brought under control by peacekeepers, we must begin the effort to distin-

guish between those remaining tasks that are appropriate for DPKO and those more appropriately handled by other actors including DPA, UNDP, other specialized UN agencies, regional or sub-regional organizations, or bilateral partners. Consequently, some missions will and should have limited goals and correspondingly limited size and resources. UN peacekeeping operations should never be allowed to crowd out or substitute for a full and participatory political process aimed at complete conflict resolution leading to long-term and sustainable peace, development, and security.

As we have often heard—peacekeeping is a growth industry. However, this should never preclude us from finding a better way to do business. We believe we can work out criteria for identifying those missions ripe for innovative action, in order to move ahead toward a final peace. Just as we have worked to identify common elements of successful peacekeeping missions for possible replication, we should also work to develop means to identify the common elements of missions that have resulted in stalemate to help us avoid repetition of past mistakes.

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## *(2) Eritrea-Ethiopia*

On December 14, 2005, Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, spoke with the press concerning the situation in Ethiopia/Eritrea. Ambassador Bolton addressed issues concerning a demand by the government of Eritrea that “certain designated military observers be withdrawn”:

. . . Obviously the government of Eritrea is acting unacceptably in making the peacekeeping force UNMEE part of the problem. But, of course, one reason we’re in this dilemma is that the government of Ethiopia has never complied with its obligations under the 2000 agreement and the 2002 border demarcation. So this is a situation I think we should take as an example of what happens when the Security Council is not able to bring an international solution with the UN peacekeeping force to a prompt conclusion consistent with the wishes of the parties.

The full text of Ambassador Bolton's statement is available at [www.un.int/usa/05\\_246.htm](http://www.un.int/usa/05_246.htm).

A Presidential Statement on the situation in Ethiopia/Eritrea adopted on the same date, U.N. Doc. S/PRST/2005/62, available at <http://documents.un.org>, stated that the Security Council had agreed, in consultation with the Secretary-General, "to temporarily relocate military and civilian staff" of UNMEE from Eritrea to Ethiopia and that the Council intended "to maintain an UNMEE military presence in Eritrea." The Security Council also condemned the lack of cooperation with UNMEE by Eritrean authorities and stated that the Security Council "intends, with the Secretariat, to review promptly all options for UNMEE's deployment and functions in the context of its original purpose, capacity to act effectively and the different military options available." Finally, the Council "emphasizes the urgent need for progress in implementation of the [Eritrea-Ethiopia Boundary commission's delimitation] decision."

Ambassador Bolton remarked as follows in answer to questions from the press, available in full at [www.un.int/usa/05\\_247.htm](http://www.un.int/usa/05_247.htm).

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. . . [Y]ou cannot be diverted from the fundamental point which is that the Council has been frustrated for three years by the government of Ethiopia's refusal to adhere to the decision—the binding, arbitral decision of the boundary commission. And while we obviously have a difficult tactical situation at the moment facing UNMEE, what the Council should do is pivot to the larger issue of resolving the gridlock that has occurred for the last three years because of the unwillingness of Ethiopia to accept the boundary commission's decision.

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. . . The issue for those military observers, as we heard this morning in the Security Council, is that there's some concern about their security. And while they're military observers, they're not a fighting force. And it would be irresponsible not to take their safety into account. Now they're not leaving the area entirely, they're just



being redeployed to Addis; in other words, they could easily go back in. But look, this is a peacekeeping operation and a fundamental precept to peacekeeping is consent of the parties. Now we don't believe, and the Secretary-General said he didn't believe that the Eritreans had fully withdrawn their consent. But I think another issue the Council has to consider is avoiding having the peacekeeping force itself be made part of the problem, and you have to look at whether the UN is a net contributor to solving the problem at this point or whether it's become part of the problem itself. . . .

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***b. Code of conduct for UN peacekeepers***

On May 18, 2005, Philo L. Dibble, Acting Assistant Secretary of State, Bureau of International Organizations, testified before the House International Relations Committee, Subcommittee on Africa, Global Human Rights and International Operations on UN peacekeeping reform. Excerpts below address efforts to prevent abuse by UN peacekeepers. The full text of Mr. Dibble's testimony is available at [www.state.gov/p/io/rls/rm/46522.htm](http://www.state.gov/p/io/rls/rm/46522.htm).

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Cases of sexual abuse and exploitation perpetrated by UN peacekeepers continue to come to light. These abhorrent, deplorable acts tarnish the reputation and effectiveness of UN peacekeeping, and demonstrate that both the UN and troop contributing countries need to strengthen their efforts to detect and prevent abuse, and bolster enforcement of the highest standards of peacekeeper conduct.

We have insisted that military contingent commanders be held accountable and that troop contributing countries take action against their peacekeepers who perpetrate acts of sexual exploitation and abuse.

We support the UN Secretary-General's enforcement of the UN policy of zero-tolerance. We commend the work of the Secretary-General's special adviser, Prince Zeid Ra'ad al-Hussein, the

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Permanent Representative of Jordan, who crafted a comprehensive strategy with recommendations to eliminate future sexual exploitation and abuse in UN peacekeeping operations.

We endorse the recommendations of the UN General Assembly's Special Committee on Peacekeeping to strengthen enforcement of a uniform UN code of conduct for peacekeepers, improve the capacity of the UN to investigate allegations of sexual exploitation and abuse, broaden assistance to victims, and enhance pre-deployment training for UN peacekeepers.

We welcomed the creation of personal conduct units within the UN Missions in Burundi, Cote d'Ivoire, the Democratic Republic of Congo, and Haiti to address allegations and to assist victims. We encourage the UN. to establish similar units in each of its peacekeeping missions.

We will continue to address the issue forcefully with offending troop contributors and to advocate at the UN for system-wide reforms. Senior U.S. officials, including then-Secretary Powell, have raised our concerns at the highest levels of the UN Secretariat, within the Security Council, and in troop contributing countries. There is broad support for a strong response designed to end sexual exploitation and abuse by personnel in UN peacekeeping missions.

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### C. PEACEBUILDING

#### 1. Peacebuilding Commission

On December 20, 2005, the UN General Assembly and the Security Council acted concurrently to establish the Peacebuilding Commission ("PBC"), as discussed in Chapter 7.A.1.e.(1). For further information, see the commission's homepage at [www.un.org/peace/peacebuilding](http://www.un.org/peace/peacebuilding), which provides the following description.

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The Peacebuilding Commission will marshal resources at the disposal of the international community to advise and propose integrated strategies for post-conflict recovery, focusing attention on

reconstruction, institution-building and sustainable development, in countries emerging from conflict.

The Commission will bring together the UN's broad capacities and experience in conflict prevention, mediation, peacekeeping, respect for human rights, the rule of law, humanitarian assistance, reconstruction and long-term development.

## **2. U.S. Efforts for Reconstruction and Stabilization**

On December 7, President Bush issued Presidential National Security Presidential Directive 44, "Management of Inter-agency Efforts Concerning Reconstruction and Stabilization." A press release of the same date from the White House described the new directive as set forth below, available at [www.whitehouse.gov/news/release/2005/12/20051214.htm](http://www.whitehouse.gov/news/release/2005/12/20051214.htm). See also fact sheet issued by the Department of State at [www.state.gov/r/pa/prs/ps/2005/58067.htm](http://www.state.gov/r/pa/prs/ps/2005/58067.htm).

On December 7, President Bush issued a new Presidential directive to empower the Secretary of State to improve coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife. These improved capabilities should enable the U.S. to help governments abroad exercise sovereignty over their own territories and to prevent those territories from being used as a base of operations or safe haven for extremists, terrorists, organized crime groups, or others who pose a threat to U.S. foreign policy, security, or economic interests.

The directive establishes that the Secretary of State shall coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities. Depending on the situation, these operations can be conducted with or without U.S. military engagement. When the U.S. military is involved, the Secretary of State shall coordinate such efforts with the Secretary of Defense to ensure harmonization with any planned or ongoing U.S. military operations across the spectrum of conflict. The United States shall work with other countries

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and organizations, to anticipate state failure, avoid it whenever possible, and respond quickly and effectively when necessary and appropriate to promote peace, security, development, democratic practices, market economies, and the rule of law.

### **Cross References**

*Speech on rule of law in preventing conflict and rebuilding societies*, Chapter 3.C.1.

*U.S. foreign policy goals in the Middle East*, Chapter 10.A.6.a.

*North Korea Six-Party talks*, Chapter 18. C.1.a.

*U.S.-India joint statement*, Chapter 18.C.1.c.

## CHAPTER 18

### Use of Force and Arms Control

#### A. USE OF FORCE

##### 1. General

##### *a. Interpretive disputes*

On November 1, 2005, Department of State Legal Adviser John B. Bellinger, III, addressed the Atlantic Council workshop on Transatlantic Approaches to the International Legal Regime in an Age of Globalization and Terrorism on “the differing approaches of the United States and Europe toward international law and legal institutions.” Excerpts in this chapter focus on law of war issues; treaty-related issues are discussed in Chapter 4.B.1. The full text of Mr. Bellinger’s speech is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The interpretive disputes recently invoked to evidence a transatlantic divide have tended to involve the use of force and the laws of war. Although the United States and its European allies have not always agreed on the answer to international legal questions relating to the use of force—nor has all of Europe agreed—everyone remains committed to a system where the rule of law governs this core issue. This is why President Bush has consistently underscored the legal bases for our actions in Iraq and Afghanistan in UN Resolutions. In Afghanistan, after the UN Security Council recognized

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the right of countries attacked on September 11 to use force in self defense, on the day we initiated hostilities in Afghanistan, the United States notified the Security Council that we were exercising our right to use force in self defense under Article 51 of the United Nations Charter. And in Iraq, the United States relied on the authority of UN Security Council Resolutions 678 and 687 to use all necessary means to compel Iraq to comply with its international obligations. This was not a new or novel legal argument. This was the legal basis relied on by the United States to police the no-fly zones for nearly ten years and that had been recognized by the Secretary General of the UN. Of course, one can reasonably argue as a policy matter that the United States and coalition partners should not have used force without a new endorsement by the Security Council. But this is again a policy argument masquerading as a legal criticism. The United States has never suggested that the Resolutions could be disregarded, and we have acted consistently with our understanding of the Resolutions. And the United States believed, and continues to believe, that it was enforcing compliance by Iraq and Afghanistan with their international legal obligations, which is a point that sometimes gets lost in attempts to shift the focus to U.S. conduct.

Even with respect to U.S. detention of terrorists in the war on terrorism, many European critics have been too quick to disparage U.S. actions as violations of the Geneva Conventions or other international law, without being able to point to particular provisions we are supposed to have violated. As a lawyer committed to the rule of law and individual rights, I can certainly understand a policy yearning that international rules regulate the detention of any human beings, but in fact the international rules applicable to combatants who do not themselves observe international humanitarian law are far from clear. The reality is not that the United States has acted lawlessly, in violation of its international obligations; rather, the United States has not adopted policies or acted in a way that some critics in Europe would like us to do.

In short, I do not mean to deny that there are transatlantic differences on international law issues; examined closely, however, they have little to do with respect for international law and institutions. Rather, the differences may be rooted more in our different

approaches to supranational institutions, which stem from our respective experiences in World War II and its aftermath. European integration is unlike anything that U.S. citizens have experienced, and the positive experience with European supranational institutions may account for the lesser skepticism that Europeans have toward international institutions.

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Moreover—and this point is equally fundamental—multilateralism is not always a viable option, and the failure to act multilaterally is not tantamount to disregarding international law. Acting individually should not be confused with acting unlawfully. . . .

Finally, we must confront the fact that both multilateralism and international law are undergoing considerable stress, as reflected in recent controversies regarding the law of war and occupation—in particular the Hague Regulations and the Geneva Conventions. We are a country that believes in international law and we have gone to great lengths to ensure that our actions are consistent with the Hague Regulations, the Geneva Conventions and other international obligations. Moreover, our lawyers—including I am happy to say numerous lawyers from the Office of the Legal Adviser—worked hard, side by side [with] other Coalition partner lawyers and Iraqi lawyers, to ensure that our actions during the temporary administration of Iraq were consistent with international law. The disagreements that remain are primarily disagreements involving interpretation, like the kind I touched on earlier, rather than disagreements about the importance of international law. We must not allow the relatively small differences we have with some in Europe to prevent us from joining together to combat the far larger challenges to our common values with which we are currently confronted.

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This shared commitment to law and legal institutions has not been lost, and will not be. This Administration recognizes, of course, that disagreements about the application of international law in the Iraq context have raised questions in the international community regarding our commitment to comply with our international obligations. But members of the Administration have been emphatic that this commitment is not at stake. Secretary Rice has

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repeatedly reaffirmed our support for international law and institutions, including in remarks this spring before the American Society of International Law. In those remarks, the Secretary stated that, “[o]ne of the pillars of [our] diplomacy is our strong belief that international law is vital and a powerful force in the search for freedom. The United States has been and will continue to be the world’s strongest voice for the development and defense of international legal norms.” . . .

The United States, like Europe, recognizes that the test of its commitment to international law values comes when questions are not symbolic, but rather in difficult circumstances when compromises are required. I have already mentioned how the President made an extraordinary decision to ensure domestic compliance with the ICJ decision regarding the Vienna Convention on Consular Relations, despite evident opposition to such a step. As another example, Secretary Rice worked hard last spring to find an acceptable formula for a Security Council resolution to address the issue of accountability in Sudan. While the United States continues to maintain fundamental objections to the ICC, we did not veto UNSCR 1593, which referred the situation in Darfur to the ICC, because we recognized the need for the international community to work together to end the atrocities in Sudan and speak with one voice to bring to account the perpetrators of those crimes. Moreover, we have re-emphasized that we respect the right of other countries to become party to and support the ICC, but we expect ICC parties to respect our right not to become a party and not to be covered by the Rome Statute. In short, the United States will continue to be a strong advocate of international responsibility in all its dimensions—not just in the form of criminal accountability, but also peacekeeping and related humanitarian efforts in the Sudan and other crisis spots—and we know we will be working with our European allies in these endeavors.

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This Administration remains committed to expanding the rule of law both in the domestic affairs of states and in their relations with each other. We remain committed to promoting the development of international law and its institutions. We intend to work with our



European allies to achieve these goals, and we plan to talk more clearly—and more often—about these issues as we go forward.

***b. Lawyers and wars***

At the September 30, 2005 Symposium in Honor of Edward R. Cummings\* on Lawyers and Wars, hosted by the George Washington University Law School, Mr. Bellinger addressed the protection of civilians in armed conflict, combatancy status, and the use of conventional weapons deemed to have indiscriminate effects. The full text of Mr. Bellinger's remarks, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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Allow me to turn to the three aspects of the law of armed conflict about which I'd like to make some brief comment: the protection of civilians and others detained by a party to conflict; the problem of the illegitimate combatancy; and the expansion of the protections against conventional weapons deemed indiscriminate. These are, respectively, a conundrum, a blot and a success, and I'll try to keep my comments brief.

First, let us consider the protection of persons held by a party to an international armed conflict. What I want to emphasize is the lamentable reality of legal gaps related to protected persons—the fact that, despite the widespread desire to see the Conventions as covering all persons in every given situation, there are lacunae that give rise to difficult legal questions. Beginning with civilians, the Fourth Geneva Convention of 1949 aimed to protect civilians in the situation where a civilian is in the hands of an enemy power. It focuses in particular on civilians in the hands of the enemy in occupied territory and in the territory of the enemy power, but it excludes nationals of neutrals or co-belligerents, those of non-Party states and

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\* Edward R. Cummings, an attorney-adviser and assistant legal adviser with the Department of State Office of the Legal Adviser since 1979, was an acknowledged international legal expert on a wide range of law of war issues. The Office of the Legal Adviser regrets his untimely death on February 27, 2006, after a protracted illness.

those covered under the other Conventions. Pictet, in the Commentaries, takes the design of the Fourth Convention to mean that everyone is legally protected by the Convention somehow, although it is self-evident—from the exclusions—that this is not really so.

The same can be said of the Third Convention, which deals with the protection of prisoners of war. It is by now well known that Article 4 of the Third Convention provides us with definitive guidance as to who may legitimately expect to be provided with the status of prisoner of war, POW. Pictet referred to the requirement of falling into a specific category under Article 4 as one of the “essential conditions” of POW status. By its very definition, Article 4 excludes those not falling within its ambit. The Administration has obviously come under great pressure for this point, but I believe that in all of the protest one point has been missing. Namely, as Pictet says in a footnote to his introductory comments on Article 4, some persons may be outside the Convention but not the law of nations in general. He quotes generally from the Martens Clause from the 1907 Hague Convention IV, which says that “in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” We have paraphrased this in the Bush Administration by recalling that all detainees will be afforded humane treatment regardless of status.

We understand that this solution has not been satisfactory to many, and we could have a very lengthy conversation as to why it appears the best solution still. What I want to say now is that we are well aware of the concerns that have been expressed and of positions that have been taken or suggested on this matter. These issues are extremely complex and we will continue to assess them as lawyers and recommend approaches to policymakers.

Now let me move on to my second area, the more general question of civilian protection against the kinds of fighters who take the mantle of the terrorist. This is an area that has stained the credibility of the law of armed conflict. Here it should be recognized that two factors have worked against civilian protection. The first and most important factor is the nature of the conflict violent extrem-

ists wage against us. This has nothing to do with law and everything to do with the inhumanity and brutality of this particular enemy. Its modus operandi—especially the suicide bomber—is perfidious, aiming not at military objectives but civilians as civilians. The goal is massacre, plain and simple, and they represent the greatest threat to civilian protection today. They are today's *hostes humani generis*, the outlaw, the enemy of mankind.

More problematic from the lawyer's perspective—or at least this lawyer's perspective—is how law deals with the kind of situation where a would-be terrorist seeks to cloak his actions in the garb of legitimate combatant. This second factor working against civilian protection is fueled in part by Article 44 of Additional Protocol I, which suggests that combatants do not need to distinguish themselves from the civilian population except prior to and during an attack. To be fair, there is no doubt that a terrorist would not meet the combatancy definition of any instrument of international humanitarian law. But the very fact that Additional Protocol I allows greater flexibility in distinction undermines this fundamental protection. The principle of distinction, among the foundational principles of humanitarian law, exists for the purposes of civilian protection, to ensure that fighters can identify the combatant from the bystander. Article 44, pressed so strongly for largely political reasons in the 1970s, undermines it. And as a result, one has to lament that the process of negotiating international humanitarian law instruments has not always inured to the civilian population's benefit.

Third and lastly I want to touch an area that has really been at the core of Ed's mission in recent years and a central element of America's law of war efforts since the late 1970s. Here I am talking about the protection of civilians against certain conventional weapons deemed to have indiscriminate effects. Since 1980 states working within the framework of the Convention on Conventional Weapons, or CCW, have quietly but firmly advanced the protection of civilians both during armed conflict and in its aftermath. Three particular areas come to mind immediately. First is the pathbreaking amendment to the second CCW protocol, restricting the use and abuse of anti-personnel landmines in both international and non-international armed conflict. On this score I nod in the direction of GW's very own Professor Mike Matheson, who, as head of the U.S. delegation in the mid-1990s, bears a great share of the responsibility for the

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adoption of Amended Protocol II. The Amended Mines Protocol has attracted widespread adherence not only in recognition of the protections it affords civilians but because of the balance it reaches between military and humanitarian objectives. Second is the important amendment to the framework agreement itself that expands its coverage to non-international armed conflicts—thus furthering a long-held goal of the United States to ensure protections of civilians in all kinds of armed conflicts. Third is last year's adoption of a protocol aimed at reducing the incidence of explosive remnants of war, or unexploded ordnance.

Unlike other international humanitarian law instruments, the CCW is dynamic, flexible and capable of adjusting to the interests of states and humanitarian goals. Ed's stewardship of the U.S. delegation over the last several years has resulted in substantial gains for civilians, and it is my intention that the United States will continue to exercise leadership in the CCW.

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### ***c. UN Security Council resolutions and specialized bodies of law***

On September 9, 2005, Mr. Bellinger addressed the international conference of the International Institute of Humanitarian Law in San Remo, Italy, on the topic "United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights and Refugee Law." As to the relationship between the Security Council and specialized bodies of law, Mr. Bellinger addressed the role of the Council in encouraging states to respect and implement the law of war and human rights law and its actions to ensure the application of the law of war, human rights law, and other specialized bodies of law by creating institutions or mechanisms under Chapter VII of the UN Charter. Mr. Bellinger then discussed the Council's use of its Chapter VII authorities to create specific legal frameworks, as excerpted below. The full text of Mr. Bellinger's remarks at San Remo is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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. . . [T]he Council has invoked its Chapter VII authorities to create specific legal frameworks to address threats to international peace and security. While these frameworks typically incorporate specialized bodies of law as part of the legal foundation of the Council's response, there are cases in which the Council has adapted these bodies of law in order to meet the threat. This is a significant development.

Before turning to these cases, I want to pause on this proposition that Council action can have the effect of tailoring a specialized body of international law to better work in a specific set of circumstances.

The Council has authority under Chapter VII, when necessary for the maintenance of international peace and security, to authorize measures that may be inconsistent with otherwise applicable treaties. Under Article 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."

The occupation of Iraq presents a good example of Council action in this area, and also provides an excellent illustration of the important role that the Council can play in resolving possible differences within the international community over what specific rules of international law govern the international community's response to crisis.

Prior to the Iraq intervention, lawyers for the United States and its Coalition partners thoroughly analyzed a complex range of issues related to the expected occupation of Iraq. This review involved developing an understanding of how the law of occupation—in particular the Hague Regulations and Geneva Convention—would likely apply to Coalition activities. At the same time, there already existed a broad and complex range of Chapter VII Security Council resolutions addressing a number of issues, including Iraqi requirements to disarm, economic and arms embargos, and restrictions related to the production and sale of Iraqi petroleum products. As the Coalition analyzed the principles of occupation law, we were careful also to analyze the extent to which pre-existing Chapter VII resolutions included provisions that might them-

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selves establish authorities or limitations that might interact with those otherwise applicable under occupation law.

In the course of this review, we found that we faced some difficult tasks in reconciling the legal rules. For example, how should authorities and limitations contained in the Hague Regulations related to the right of an occupying power to produce and use natural resources, and to expend their sales proceeds, be evaluated in light of provisions in Security Council resolutions that by their terms clearly limited the sale of Iraqi oil and use of oil proceeds?

Such questions were ultimately addressed by the Security Council in its series of Iraq resolutions—resolutions 1483, 1511 and, ultimately, 1546. Resolution 1483, adopted in May 2003 by the Security Council under Chapter VII of the UN Charter, provided for a distinct stage of transitional governance in Iraq prior to the assumption of authority by an internationally recognized, representative government. While resolution 1483, in its preambular paragraphs, recognized the specific authorities, responsibilities and obligations under applicable international law of the United States and its Coalition partners as occupying powers, it also set forth specific rules to govern particular aspects of the occupation.

Two examples illustrate the ways in which these resolutions helped to clarify the Coalition's legal authority in administering Iraq.

First, returning to the question of administering Iraq's oil resources, resolution 1483 modified the legal framework contained in prior resolutions and specified the authorities related to the sale of Iraqi oil and use of proceeds. Oil sales and use of proceeds are specifically authorized—indeed, they are facilitated by a grant of immunity by the Security Council—and subject to international mechanisms to guarantee the transparent use of proceeds for the benefit of the Iraqi people. Thus, it seems clear that resolution 1483 both clears away the previously existing Council limitations on oil sales and contemplates that oil proceeds may be used to fund long-term economic reconstruction projects to benefit Iraq (an activity that would at least arguably be outside the scope of authorities provided by the Hague Regulations).

A second example is the treatment of the political transformation of Iraq. Some commentators take the position that occupation law establishes limitations on the ability of the occupying power to

alter institutions of government permanently or change the constitution of a country. Resolutions 1483, 1511 and 1546, however, remove any doubt that these are key objectives related to the political transformation of Iraq. The legal framework for political transition established by these resolutions has now taken Iraq through the occupation and two interim governmental stages, and—with the continued support of the international community—will hopefully culminate in the passage of a new Iraqi constitution on October 15.

The United Kingdom's High Court of Justice has recently issued a significant judicial decision that specifically addresses another Iraq-related example of the phenomenon that we are discussing today—that of the authority of the MNF under resolution 1546 to detain security internees and the relationship of that authority to existing human rights law. In the *Al Jeddah* case, an individual detained by British forces in Iraq challenged the detention as inconsistent with human rights guarantees provided under the United Kingdom's domestic law implementing the European Convention on Human Rights. The UK High Court was specifically called upon to address whether the rules established by a resolution adopted under Chapter VII could apply in lieu of the rules applicable under such treaties.

In assessing the language of Resolution 1546, the Court in *Al Jeddah* concluded that internment was clearly authorized and, noting that the standard justifying detention is drawn from Article 78 of the Fourth Geneva Conventions, that the procedures contained in Article 78 govern the detention process.

The Court next turned to the question of whether the authorization provided by UNSCR 1546 could override the provisions reflected under the UK's domestic law implementing the ECHR. The Claimant argued that such an authorization could not supervene human rights law. Again, the Court disagreed, finding that the provisions of the UN Charter, in particular those authorities established under Chapter VII of the Charter, clearly allow the Security Council, when necessary to discharge its primary responsibility for maintaining international peace and security, to authorize detention for imperative reasons of security even if such detention were inconsistent with provisions in human rights treaties, and that ac-

tions taken in pursuance of UNSCR 1546 prevail over other treaty obligations such as Article 5 of the ECHR.

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## 2. International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention on the Physical Protection of Nuclear Material

As discussed in C.2.f. below and Chapter 3.B.1.b.(1), on April 13, 2005, the UN General Assembly adopted by consensus the International Convention for the Suppression of Nuclear Terrorism (“Nuclear Terrorism Convention”), U.N.Doc. A/RES/59/290 (2005). Article 4 limits the scope of the convention in two ways relevant to the use of force. Article 4(2) of the convention provides that the new convention does not apply to “the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law” nor “activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law.” Article 4(4) provides that the convention “does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States.” The full text of the Convention is available at [http://untreaty.un.org/English/Terrorism/English\\_18\\_15.pdf](http://untreaty.un.org/English/Terrorism/English_18_15.pdf).

A 2005 amendment to the 1979 Convention on the Physical Protection of Nuclear Material (“CPPNM”), TIAS 11080, also discussed in C.2.e. below and in Chapter 3.B.1.b.(2), includes as new Article 2.4(b) the same military exclusion language as the Nuclear Terrorism Convention. New Article 2.4.(c) provides further that “[n]othing in this Convention shall be construed as a lawful authorization to use or threaten to use force against nuclear material or nuclear facilities used for peaceful purposes.” New Article 2.5 excludes from the Convention’s application “nuclear material used or retained for military purposes or to a nuclear facility containing such material.” The full text of the amendment is reprinted in the report by the Director General containing the Final Act adopted July 8, 2005, GOV/INF/



2005/10-GC(49)/INF/6, available at [www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf](http://www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf).

### **3. Detainees**

#### **a. U.S. submissions to the United Nations relating to detainees**

##### **(1) Periodic Report to the Committee Against Torture**

On May 6, 2005, the United States submitted its Second Periodic Report to the Committee Against Torture in the UN Office of the High Commissioner of Human Rights, in keeping with the requirement for periodic reports in Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as discussed in Chapter 6. E.1. Annex 1 of the report, with Declarations on Transfers of Detainees from Guantanamo Bay by Matthew C. Waxman and Pierre-Richard Prosper attached as Tab 1, contained detailed information on U.S. practice with regard to treatment of detainees held in Guantanamo, Afghanistan, and Iraq. Excerpts follow. The full text of the report with annexes is available at [www.state.gov/g/drl/rls/45738.htm](http://www.state.gov/g/drl/rls/45738.htm).

## **PART ONE**

### **INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES CAPTURED DURING OPERATIONS AGAINST AL-QAIDA**

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#### **B. Status of Detainees at Guantanamo Bay and in Afghanistan**

On February 7, 2002, shortly after the United States began operations in Afghanistan, President Bush's Press Secretary announced the President's determination that the [Third] Geneva Convention "appl[ies] to the Taliban detainees, but not to the al Qaeda international terrorists" because Afghanistan is a party to the Geneva Convention, but al Qaeda—an international terrorist group—is not. (citation omitted) Although the President deter-

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mined that the Geneva Convention applies to Taliban detainees, he determined that, under Article 4, such detainees are not entitled to POW status . . . He explained that:

Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status. . . .

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. . . . Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty. (citations omitted)

After the President's decision, the United States concluded that those who are part of al-Qaida, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POWs (*i.e.*, privileged combatants) under the Third Geneva Convention. International law, including the Geneva Conventions, has long recognized a nation's authority to detain unlawful enemy combatants without benefit of POW status. *See, e.g.*, Ingrid Detter, *The Law of War* 148 (2000) ("Unlawful combatants . . . though they are a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status."); *see also United States v. Lindh*, 212 F. Supp. 2d. 541, 558 (E.D. Va. 2002) (confirming the Executive branch view that "the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.")

Because there is no doubt under international law as to the status of al-Qaida, the Taliban, their affiliates and supporters, there is no need or requirement to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status. For example, Article 5 of the Third Geneva Convention requires a tribunal in certain cases to determine whether a belligerent (or combatant) is entitled to POW status under the Convention only when there is doubt under any of the categories enumerated in Article 4. The United States concluded that Article 5 tribunals were unnecessary because there is no doubt as to the status of these individuals.

After the decisions of the U.S. Supreme Court in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), . . . the U.S. Government established a process on July 7, 2004, to conduct Combatant Status Review Tribunals (CSRTs) at Guantanamo Bay. (At <[www.defenselink.mil/transcripts/2004/tr200440707-0981.html](http://www.defenselink.mil/transcripts/2004/tr200440707-0981.html)> (visited March 1, 2005) (Department of Defense Briefing on Combatant Status Review Tribunal, dated July 7, 2004)). Consistent with the Supreme Court decision in *Rasul*, these tribunals supplement the prior screening procedures and serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention. The tribunals were established in response to the Supreme Court decision in *Rasul* and draw upon guidance contained in the U.S. Supreme Court decision in *Hamdi* that would apply to citizen-enemy combatants in the United States.

### **C. Combatant Status Review Tribunals (CSRTs) for Detainees at Guantanamo Bay**

Between August 2004 and January 2005, various Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo, in a fact-based proceeding, to determine whether the individual is still classified as an enemy combatant. As reflected in the Order establishing the CSRTs, an enemy combatant is “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” (citation omitted) Each detainee has the opportunity to contest such designation. The Deputy Secretary of Defense appointed the Secretary of the Navy, The Honorable Gordon England, to implement and oversee this process. On July 29, 2004, Secretary England issued the implementation directive for the CSRTs, giving specific procedural and substantive guidance. (At <<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>> (visited March 1, 2005)). On July 12-14, 2004, the United States notified all detainees then at Guantanamo of their opportunity to contest their enemy combatant status under this process, and that a federal court has jurisdiction to entertain a petition for habeas corpus brought on their behalf. The Government has

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also provided them with information on how to file habeas corpus petitions in the U.S. court system. (At <http://www.defenselink.mil/news/Dec2004/d20041209ARB.pdf> (visited March 1, 2005)). When the Government has added new detainees, it has also informed them of these legal rights.

CSRTs offer many of the procedures contained in US Army Regulation 190-8. The Supreme Court specifically cited these Army procedures as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution. For example:

- Tribunals are composed of three neutral commissioned officers, plus a non-voting officer who serves as a recorder;
- Decisions are by a preponderance of the evidence by a majority of the voting members who are sworn to execute their duties impartially;
- The detainee has the right to (a) call reasonably available witnesses, (b) question witnesses called by the tribunal, (c) testify or otherwise address the tribunal, (d) not be compelled to testify, and (e) attend the open portions of the proceedings;
- An interpreter is provided to the detainee, if necessary; and
- The Tribunal creates a written report of its decision that the Staff Judge Advocate reviews for legal sufficiency. (citation omitted)

Unlike an Article 5 tribunal, the CSRT guarantees the detainee *additional* rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. The rules entitle the detainee to receive an unclassified summary of the evidence in advance of the hearing in the detainee's native language, and to introduce relevant documentary evidence. (citations omitted) In addition, the rules require the Recorder to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." (citation omitted) The detainee's Personal Representative also has access to the government files and can search for and provide relevant evidence that would support the detainee's position.

A higher authority (the CSRT Director) automatically reviews the result of every CSRT. He has the power to return the record to

the tribunal for further proceedings if appropriate. (citation omitted) The CSRT Director is a two-star admiral—a senior military officer. CSRTs are transparent proceedings. Members of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the unclassified portions of the CSRT proceedings. They also have access to the unclassified materials filed in Federal court. Every detainee now held at Guantanamo Bay has had a CSRT hearing. New detainees will have the same rights.

As of March 29, 2005, the CSRT Director had taken final action in all 558 cases. Thirty-eight detainees were determined no longer to be enemy combatants; twenty-three of them have been subsequently released to their home countries, and at the time of this Report's submission, arrangements are underway for the release of the others. (At <http://www.defenselink.mil/releases/2005/nr20050419-2661.html> (visited April 25, 2005)).

#### **D. Assessing Detainees for Release/Transfer**

##### **1. Guantanamo Bay**

The detention of each Guantanamo detainee is reviewed annually by an Administrative Review Board (ARB), established by an order on May 11, 2004 (*Review Procedure Announced for Guantanamo Detainees*, Department of Defense Press Release, May 18, 2004) (at <http://www.defenselink.mil/releases/2004/nr20040518-0806.html> (visited February 28, 2005)) and supplemented by an implementing directive on September 14, 2004. See *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (visited February 28, 2005)).

The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release.

Each enemy combatant is provided with an unclassified written summary of the primary factors favoring the detainee's continued

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detention and the primary factors favoring the detainee's release or transfer from Guantanamo. The enemy combatant is also provided with a military officer to provide assistance throughout the ARB process. In addition, the review board will accept written information from the government of nationality, and from the detainee's relatives through that government, as well as from counsel representing detainees in habeas corpus proceedings. Based on all of this information, as well as submissions by U.S. Government agencies, the ARB makes a written assessment by majority vote on whether there is reason to believe that the enemy combatant no longer poses a threat to the United States or its allies in the ongoing armed conflict and any other factors bearing on the need for continued detention. The Board also makes a written recommendation on whether detention should be continued. The recommendations of the board are reviewed by a judge advocate for legal sufficiency and then go to the Designated Civilian Official (currently Secretary of the Navy Gordon England), who decides whether to release, transfer or continue to detain the individual.

As of April 26, 2005, the Department of Defense (DoD) has announced its intent to conduct Administrative Review Board reviews for 254 detainees; it has informed the detainees' respective host countries and asked them to notify the detainees' relatives; and it has invited them to provide information for the hearings. (At <[www.defenselink.mil/news/combatant\\_Tribunals.html](http://www.defenselink.mil/news/combatant_Tribunals.html)> (visited April 28, 2005)). The first Annual Administrative Review Board began on December 14, 2004, and 91 Administrative Review Boards have been conducted as of April 26, 2005.

The United States has no interest in detaining enemy combatants any longer than necessary. On an ongoing basis, even prior to the Annual Administrative Review Boards, the U.S. Government has reviewed the continued detention of each enemy combatant. The United States releases detainees when it believes they no longer continue to pose a threat to the United States and its allies. Furthermore, the United States has transferred some detainees to the custody of their home governments when those governments 1) are prepared to take the steps necessary to ensure that the person will not pose a continuing threat to the United States or its allies; and/or 2) are prepared to investigate or prosecute the person, as appropri-

ate. The United States may also transfer a detainee to a country other than the country of the detainee's nationality, when the country requests transfer for purposes of criminal prosecution.

As of April 26, 2005, the United States has transferred 234 persons from Guantanamo—169 transferred for release and 66 transferred to the custody of other governments for further detention, investigation, prosecution, or control. Of the 66 detainees who were transferred to the control of other governments, 29 were transferred to Pakistan, seven to Russia, five to Morocco, nine to the United Kingdom, six to France, four to Saudi Arabia, two to Belgium, one to Kuwait, one to Spain, one to Australia, and one to Sweden.

In some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality or when they have expressed reasonable fears if returned. Until the United States can find a suitable location for the safe release of a detainee, the detainee remains in U.S. control.

It is often difficult to assess whether an individual released from Guantanamo will return to combat and pose a threat to the United States or its allies. Determining whether an individual truly poses a threat is made more difficult by information that is often ambiguous or conflicting, as well as by denial and deception efforts on the part of the individual detainees. Based on information seized at al-Qaida camps in Afghanistan and elsewhere, the United States is aware that Taliban and al-Qaida fighters are trained in counter-interrogation techniques and instructed to claim, for example, that they are cooks, religious students, or teachers. It has proven challenging to ascertain the true facts and has required a great deal of time to investigate fully the background of each detainee. There is a concerted, professional effort to assess information from the field, from interrogations, and from other detainees. In spite of rigorous U.S. review procedures, some detainees who were released from Guantanamo have returned to fighting in Afghanistan against U.S. and allied forces. Based on a variety of reports, as many as twelve individuals have returned to terrorism upon return to their country of citizenship.

\* \* \* \*



The fact that some detainees upon their release are returning to combat underscores the ongoing nature of the armed conflict with al-Qaida and the practical reality that in defending itself against al-Qaida, the United States must proceed very carefully in its determination of whether a detainee no longer poses a threat to the United States and its allies.

## 2. Afghanistan

Detainees under DoD control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.

## E. Transfers or Releases to Third Countries

After it is determined that a detainee no longer continues to pose a threat to the U.S. security interests or that a detainee no longer meets the criteria of enemy combatant and is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. . . .

\* \* \* \*

With respect to the application of [transfer] policies to detainees at Guantanamo Bay, the U.S. Government in February of 2005 filed factual declarations with a Federal court for use in domestic litigation. These declarations describe in greater detail the applica-



tion of the policy described above as it applies to the detainees at Guantanamo Bay, and are attached as Tab 1 to this Annex.\*

#### **F. Military Commissions to Try Detainees Held at Guantanamo Bay**

In 2001, the President authorized military commissions to try those detainees charged with war crimes. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001 (at <<http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html>> (visited February 28, 2005)). The Geneva Conventions recognize military fora as legitimate and appropriate to try those persons who engage in belligerent acts in contravention of the law of war. The United States has used military commissions throughout its history. During the Civil War, Union Commanders conducted more than 2,000 military commissions. Following the Civil War, the United States used military commissions to try eight conspirators (all U.S. citizens and civilians) in President Lincoln's assassination. During World War II, President Roosevelt used military commissions to prosecute eight Nazi saboteurs for spying (including at least one U.S. citizen). A military commission tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. In addition to the international war crimes tribunals, the Allied Powers, such as England, France, and the United States, tried hundreds of lesser-known persons by military commissions in Germany and the Pacific theater after World War II.

To date, the President has designated fifteen individuals as eligible for prosecution by military commission. Of those, the United States has since transferred three to their country of nationality, which has released them. Four Guantanamo detainees have been charged and have had preliminary hearings before a military commission. These four cases are currently in abeyance, pending appellate court review of the recent U.S. District Court for the District of Columbia's decision of November 8, 2004, in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

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\* Editor's note: *See Declaration of Ambassador Prosper*, excerpted below.

**G. Access to U.S. Courts\***

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**III. DETAINEES—TREATMENT**

**A. Description of Conditions of Detention at Department of Defense Facilities**

**1. Guantanamo Bay**

The Department of Defense has released to the public several photographs of the detention facilities in Guantanamo Bay. (At <<http://www.defenselink.mil/home/features/gtmo>> (visited March 17, 2005)). These photographs reflect U.S. policy and practices regarding treatment of detainees at Guantanamo Bay, including the U.S. requirement that all detainees receive adequate housing, recreation facilities, and medical facilities. Detainees receive:

- Three meals per day that meet cultural dietary requirements;
- Adequate shelter, including cells with beds, mattresses, and sheets;
- Adequate clothing, including shoes, uniforms, and hygiene items;
- Opportunity to worship, including prayer beads, rugs, and copies of the Koran;
- The means to send and receive mail;
- Reading materials, including allowing detainees to keep books in their cells; and
- Excellent medical care.

All enemy combatants get state-of-the art medical and dental care that is comparable to that received by U.S. Armed Forces deployed overseas. Wounded enemy combatants are treated humanely and nursed back to health, and amputees are fitted with modern prosthetics.

Detainees write to and receive mail from their families and friends. Detainees who are illiterate, but trustworthy enough for a classroom setting, are taught to read and write in their native language so they, too, can communicate with their families and friends.

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\* Editor's note: See 3.b. below, *Digest 2004* at 995-1035, and *Digest 2003* at 1027-30.

Enemy combatants at Guantanamo may worship as desired and in accordance with their beliefs. They have access to the Koran and other prayer accessories. Traditional garb is available for some detainees. Where security permits, detainees are eligible for communal living in a new Medium Security Facility, with fan-cooled dormitories, family-style dinners, and increased outdoor recreation time, where they play board games like chess and checkers, and team sports like soccer.

The United States permits the International Committee of the Red Cross to visit privately with every detainee in DoD control at Guantanamo. Communications between the U.S. Government and the ICRC are confidential.

In addition, legal counsel representing the detainees in habeas corpus cases have visited detainees at Guantanamo since late August 2004. As of late April 2005, counsel in nineteen cases had personally met with the 74 detainees they represent, and counsel in seventeen of those cases have made repeat visits to Guantanamo. To date, every request by American counsel of record in the habeas cases to visit detainees at Guantanamo has been granted, after that counsel has received the requisite security clearance and agreed to the terms of the protective order issued by the Federal court. The Government does not monitor these meetings (or the written correspondence between counsel and detainees), which occur in a confidential manner. The Government also allows foreign and domestic media to visit the facilities.

## **2. Afghanistan**

The Department of Defense holds individuals in Afghanistan in a safe, secure, and humane environment. The primary focus of DoD detainee operations in Afghanistan is to secure detainees from harm, recognizing the reality that the U.S. Armed Forces continue to engage in combat in Afghanistan.

The Department of Defense operates theater internment facilities at Kandahar and Bagram. These facilities house enemy combatants identified in the war against al-Qaida, the Taliban and their affiliates. The Department of Defense has registered with the ICRC individuals held under its control in Afghanistan. ICRC has access to these DoD facilities and conducts private interviews with detain-

ees. In addition, the U.S. Armed Forces operates forward operating bases that, from time to time, may house on a temporary basis individuals detained because of combat operations against al-Qaida, Taliban, and affiliated forces.

The Department of Defense provides detainees in Afghanistan with adequate food, shelter, clothing, and opportunity to worship. In addition, DoD initiatives will increase available resources for literacy and education training. The Department of Defense also gives Afghani detainees information regarding the establishment of the new Afghan government, as well as a copy of the Afghan Constitution.

The U.S. Government is also in a process of improving the detention facilities at both Bagram and Kandahar. Improved facilities should be available to detainees later in 2005.

## **B. Allegations of Mistreatment of Persons Detained by the Department of Defense**

### **1. Introduction**

The United States is well aware of the concerns about the mistreatment of persons detained by the Department of Defense in Afghanistan and at Guantanamo Bay, Cuba. Indeed, the United States has taken and continues to take all allegations of abuse very seriously. Specifically, in response to specific complaints of abuse in Afghanistan and at Guantanamo Bay, Cuba, the Department of Defense has ordered a number of studies that focused, *inter alia*, on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

Although these extensive investigative reports have identified problems and proffered recommendations, none of them found that any governmental policy directed, encouraged or condoned these abuses. . . .

In general, for both Afghanistan and Guantanamo Bay, these reports have assisted in identifying and investigating all credible allegations of abuse. When a credible allegation of improper conduct by DoD personnel surfaces, it is reviewed, and when factually warranted, investigated. As a result of investigation, administrative, disciplinary, or judicial action is taken as appropriate. Those credible allegations were and are now being resolved within the Combatant Command structure.

Concerns have also been generated by an August 1, 2002, memorandum prepared by the Office of Legal Counsel (OLC) at the U.S. Department of Justice (DOJ), on the definition of torture and the possible defenses to torture under U.S. law and a DoD Working Group Report on detainee operations, dated April 4, 2003, the latter of which was the basis for the Secretary of Defense's approval of certain counter resistance techniques on April 16, 2003. The 2002 DOJ OLC memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004, memorandum interpreting the legal standards applicable under 18 U.S.C. 2340-2340A, also known as the Federal Torture Statute. *See* Annex 2.

On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of his report, which included an examination of this issue. His Report examined the precise question of "whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees." Church Report, Executive Summary, at 3, released March 10, 2005 (relying upon data available as of September 30, 2005) (at <<http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>> (visited March 23, 2005)). In his Report, he wrote that "this was not the case," *id.*, finding that "it is clear that *none* of the approved policies—no matter which version the interrogators followed—would have permitted the types of abuse that occurred." *Id.*, at 15. In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, he responded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." (citation omitted). . . .

Vice Admiral Church's finding was also consistent with earlier statements by high-level U.S. officials, including by the previous White House Counsel Alberto Gonzales, who had stated:

The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the

standards of the torture conventions or the torture statute, or other applicable laws. . . .

. . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable.

Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell’Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, (at <<http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>> (visited February 28, 2005)).

Subsequent to the release of the December 2004 DOJ memo interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a “top-down” review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the department comply fully with the requirements of the new Justice Department Memorandum. The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

## **2. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable—Guantanamo Bay**

As described above in the introductory section, there have been multiple reports resulting from investigations concerning the treatment of detainees at Guantanamo Bay. For example, the Naval Inspector General reviewed the intelligence and detainee operations at Guantanamo Bay to ensure compliance with DoD orders and policies. The review, conducted in May 2004, concluded that the Secretary of Defense’s directions with respect to humane treatment of detainees and interrogation techniques were fully implemented. The Naval Inspector General documented eight minor infractions involving contact with detainees as stated below (two additional incidents occurred after this investigation was completed). In each of those cases, the chain of command took swift and effective action. Administrative actions ranging from admonishment to reduction in grade.

\* \* \* \*

### **3. Reports of Abuses, Summary of Abuse Investigations and Actions to Hold Persons Accountable—Afghanistan**

The United States acted swiftly in response to allegations of serious abuses by DoD personnel in Afghanistan. There have been 23 investigations into allegations of abuse of detainees in Afghanistan, of which 22 were substantiated and one was unsubstantiated. Seven investigations are open and continue to be investigated. As of March 1, 2005, penalties have varied and include 2 courts-martial, 10 non-judicial punishments, and two reprimands. A number of actions are still pending.

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## **PART TWO**

### **INDIVIDUALS UNDER THE CONTROL OF U.S. ARMED FORCES IN IRAQ CAPTURED DURING MILITARY OPERATIONS**

#### **I. BACKGROUND ON U.S. MILITARY OPERATIONS IN IRAQ**

The United States has approximately 150,000 U.S. military personnel currently deployed in Iraq as a part of the United Nations Security Council-authorized Multi-National Force in Iraq (MNF-I). This force includes 28 other nations and the North Atlantic Treaty Organization (which is providing training support) that are contributing approximately 25,000 military personnel to conduct stability operations in Iraq. Recognizing the importance of Iraq's successful transition to a democratically elected government and aware that the situation in Iraq continues to pose a threat to international peace and security, the Security Council authorized MNF-I to "take all necessary measures to contribute to the maintenance of security and stability in Iraq. . . ." U.N. S.C. Res. 1546 (June 8, 2004). (At <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (visited March 5, 2005)). MNF-I plays a key role in supporting first the Iraqi Interim Government and now the Iraqi Transitional Government (ITG) in its effort to stabilize the current security situation to allow democracy and freedom to take root.

\* \* \* \*

MNF-I and Iraqi forces remain actively engaged in combating these hostile forces across Iraq. An essential tool in the effort to contain and end the violence is the ability of MNF-I to capture and detain hostile forces. UN Security Council Resolution 1546 authorizes MNF-I to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters to the President of the Security Council from Dr. Ayad Allawi and Secretary of State Colin Powell. The letter from Secretary Powell noted the MNF-I's readiness to undertake those tasks necessary to counter the security threats posed by forces seeking to influence Iraq's future through violence, including the internment of individuals "where this is necessary for imperative reasons of security. . . ." (At <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> (visited March 5, 2005)). In addition, because hostilities are ongoing, MNF-I may continue to detain enemy prisoners of war ("EPWs"). MNF-I may also continue to detain civilian internees who were detained prior to June 28, 2004, as long as their detention remains necessary for imperative reasons of security. Finally, in accordance with UN Security Council Resolution 1546 and the authorities contained in Coalition Provisional Authority Memorandum No. 3 (Revised) (at [http://cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_\\_Rev\\_.pdf](http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf) (visited March 1, 2005)), which continues in effect under the Transitional Administrative Law (TAL), MNF-I may apprehend individuals who are suspected of having committed criminal acts and who are not considered security internees. MNF-I may retain such criminal detainees in its facilities at the request of appropriate Iraqi authorities.

## II. DETAINEES—CAPTURING, HOLDING, AND/OR RELEASING

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### B. Status Review of Detainees

Detainees under DoD control in Iraq undergo the review process described herein in order to confirm their status and ensure that they are being lawfully detained. Upon capture by a detaining



unit, a detainee is moved as expeditiously as possible to a theater internment facility. A military magistrate reviews an individual's detention to assess whether to continue to detain or to release him or her. If detention is continued, the Combined Review and Release Board assumes the responsibility for subsequently reviewing whether continued detention is appropriate.

With regard to individuals detained on suspicion of having committed criminal acts, those individuals must be handed over to Iraqi authorities as soon as reasonably practicable, but may be held by MNF-I at the request of appropriate Iraqi authorities based on security or detention facility capacity considerations. If MNF-I retains custody at the request of appropriate Iraqi authorities, CPA Memorandum No. 3 (Revised) establishes a series of procedural protections for the detainee, including the right to remain silent, to consult with an attorney within 72 hours, to be promptly informed in writing of charges, to be brought before a judicial officer within 90 days, and to be visited by the ICRC. (At [http://cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_\\_Rev\\_.pdf](http://cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf) (visited March 1, 2005)).

### **C. Decisions on Continued Detention or Release of Detainees**

The Combined Review and Release Board (CRRB) was created to provide detainees a method by which to have their detention status reviewed. The CRRB first met on August 21, 2004. It consists of nine members: three MNF-I officers, and two members each from the Iraqi Ministry of Justice, Ministry of Interior, and Ministry of Human Rights. The CRRB meets and reviews detention cases several times per week and reviews approximately 100 detainee files at each meeting. Consistent with the Geneva Conventions, the case of each detainee who remains in MNF-I custody is reviewed at least once every six months. The CRRB reviews the status of each detainee and recommends one of three options: release, conditional release, or continued detention. A detainee may file an appeal of internment to the CRRB for its consideration.

## **III. DETAINEES—TREATMENT**

### **A. Description of Conditions of Detention in U.S. Department of Defense Facilities**

The primary goal of U.S. detention operations in Iraq has been to operate safe, secure, and humane facilities consistent with the

Geneva Conventions. U.S. and other MNF-I forces continue to make physical improvements to various facilities throughout Iraq. Since the incidents of abuse at Abu Ghraib, the United States has made substantial improvements in all areas of detention operations, including facilities and living conditions. Families may visit detainees at visitation centers set up at each detention facility. Detainees are provided with prayer materials and allowed the open and free expression of religion in detention. Detainees also have access to medical facilities, consistent with the Geneva Conventions.

As set forth in CPA Memorandum No. 3 (Revised), and consistent with the provisions of the Geneva Conventions, the ICRC is provided with notice of detainees under the control of the U.S. contingent of MNF-I as soon as reasonably possible and is provided access to such detainees unless reasons of imperative military necessity require otherwise.

## **B. Allegations of Mistreatment of Persons Detained by the Department of Defense**

### **1. Legal Framework**

As noted above, UN Security Council Resolution 1546 provides authority for MNF-I security operations in Iraq, including detention operations. The United States contingent to MNF-I conducts its detention operations consistent with the Geneva Conventions, including pursuant to CPA Memorandum No. 3 (Revised), for operations after June 28, 2004. The Geneva Conventions prohibit the torture or inhumane treatment of protected persons. U.S. Armed Forces in Iraq are instructed to act consistently with these provisions with regard to all detainees and to treat all detainees humanely. Detainees under the control of U.S. Armed Forces receive shelter, food, clothing, water, and medical care, and are able to practice their religion.

U.S. military interrogators are instructed to conduct interrogations consistent with the Geneva Conventions. Further, military regulations strictly regulate permissible interrogation techniques. DoD policy prohibits the use of force, mental and physical torture, or any form of inhumane treatment during an interrogation. Army Regulation (AR) 190-8 provides policy, procedures, and responsibilities for the administration and treatment of enemy prisoners of

war (EPW), retained personnel (RP), civilian internees (CI), and other detainees in the custody of U.S. Armed Forces. (citation omitted) A.R. 190-8, paragraph 1-5 provides:

General Protection Policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI, and RP known to have, or suspected of having committed serious offenses will be administered [in accordance with] due process of law and under legally constituted authority per the GPW, [the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War], the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, and RP is prohibited and is not justified under the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

DoD Directive 5100.77 further requires that all possible, suspected, or alleged violations of the law of war committed by United States persons be promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action. (citation omitted) For instance, U.S. forces are subject to the Uniform Code of Military Justice (UCMJ), which provides that those who commit acts of abuse, whether or not during an armed conflict, are criminally liable for their actions. Article 93 of the UCMJ provides: “Any person subject to this chapter who is guilty of cruelty toward,

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or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.” A member of the U.S. forces suspected of mistreating or abusing persons in U.S. detention is subject to prosecution under this and other applicable UCMJ articles.

In the context of detainee abuse cases, however, not every potentially applicable offense under the UCMJ has a parallel federal offense in the U.S. Code. For example, Failure to Obey a Lawful Order or Regulation (Article 92, UCMJ) and Dereliction of Duty (Article 92, UCMJ) have no comparable federal offenses in this context. Additionally, the Federal Torture Statute requires a much higher level of proof than does Article 93 of the UCMJ, which punishes cruelty and maltreatment of prisoners.

Interrogation techniques are developed and approved to ensure compliance with legal and policy requirements. Throughout the conflict in Iraq, military, policy, and legal officials have met and continue to meet regularly to review interrogation policy and procedures to ensure their compatibility with applicable domestic and international legal standards. The United States will continue to review and update its interrogation techniques in order to remain in full compliance with applicable law.

### **2. Reports of Abuses and Summary of Abuse Investigations**

Allegations of detainee abuse at the Abu Ghraib prison in Iraq became known with incidents documented in photographs and reported in the media throughout the world. These photographs, which depict acts of abuse and mistreatment of detainees by certain members of the U.S. Armed Forces in Iraq, were abhorrent to the people of the United States and others around the world. These incidents, which to date could implicate 54 military personnel, involved blatant violations of the UCMJ and the law of war. The United States deeply regrets these abuses. Indeed, on May 6, 2004, the President of the United States said that he “was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families” and that “the wrongdoers will be brought to justice. . . .” (citation omitted)

In response to these allegations of abuse, the U.S. Government has acted swiftly to investigate and take action to address the abuses. The United States is investigating allegations of abuse thor-

oughly and making structural, personnel, and policy changes necessary to reduce the risk of further such incidents. All credible allegations of inappropriate conduct by U.S. personnel are thoroughly investigated. A rapid response to allegations of abuse, accompanied by accountability, sends an unequivocal signal to all U.S. military personnel and the international community that mistreatment of detainees will not be tolerated under any circumstances. To the extent allegations of misconduct have been levied against private contractors, the U.S. Department of Justice has conducted or initiated investigations. For example, following the reports at Abu Ghraib, the Department of Justice received referrals from Military Investigators regarding contract employees and their potential involvement in the abuses. DOJ subsequently opened an investigation.

At the direction of the President, the Secretary of Defense, and the military chain of command, nine different senior-level investigative bodies convened to review military policy from top-to-bottom in order to understand the facts in these cases and identify any systemic factors that may have been relevant. The assignment of these entities was to identify and investigate the circumstances of all alleged instances of abuse, review command structure and policy, and recommend personnel and policy changes to improve accountability and reduce the possibility of future abuse.

The United States has ordered a number of studies and reports subsequent to allegations of mistreatment in Iraq, particularly at Abu Ghraib. Again, as described in Part One of this Report, it is impossible to characterize and summarize fully these reports, but it can be stated that although these investigations identified problems and made recommendations, none found a governmental policy directing, encouraging, or condoning the abuses that occurred.

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### **3. Summary of Actions to Hold Persons Accountable**

The Department of Defense takes all allegations of abuse seriously and investigates them. Those people who are found to have committed unlawful acts are held accountable and disciplined as the circumstances warrant. Investigations are thorough and have high priority.

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Some criminal investigations have been completed and others continue with respect to abuse of detainees in Iraq. Although it would be inappropriate to comment on the specifics of on-going investigations, as of March 1, 2005, 190 incidents of abuse have been substantiated. Some are minor, while others are not: penalties have ranged from administrative to criminal sanctions, including 30 courts-martial, 46 non-judicial punishments, 15 reprimands, and 15 administrative actions, separations, or other administrative relief. A number of actions are pending.

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Over the course of 2005, substantially more information will become public on these matters as accountability processes come to completion. Accordingly, the United States will be prepared to present further information on the status of its investigations and prosecutions during its presentation of this Report to the Committee Against Torture.

### C. Remedies for Victims of Abuse

The United States is committed to adequately compensating the victims of abuse and mistreatment by U.S. military personnel in Iraq. The U.S. Army is responsible for handling all claims in Iraq. Several claims statutes allow the United States to compensate victims of misconduct by U.S. military personnel. The primary mechanism for paying claims for allegations of abuse and mistreatment by U.S. personnel in Iraq is through the Foreign Claims Act (FCA), 10 U.S.C. § 2734. Under the FCA, Foreign Claims Commissions are tasked with investigating, adjudicating, and settling meritorious claims arising out of an individual's detention. There are currently 78 Foreign Claims Commission personnel in Iraq. Claims may be submitted to the claims personnel, who regularly visit detention facilities, or they may be presented to the Iraqi Assistance Center. For persons with U.S. residency, claims may be brought pursuant to the Military Claims Act, 10 U.S.C. § 2733. All allegations of detainee abuse are investigated by the U.S. Army Claims Service (USARCS), and the Department of the Army Office of the General Counsel is the approval authority.

In addition, the Secretary of Defense has directed the Secretary of the Army to review all claims for compensation based on allega-

tions of abuse in Iraq and to act on them in his discretion. In instances where meritorious claims are not payable under the FCA or the MCA, the Secretary of the Army is responsible for identifying alternative authorities to provide compensation and either to take such action or forward the claim to the Deputy Secretary of Defense with a recommendation for action.

\* \* \* \*

In his declaration attached to Annex 1 as Tab 1, Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, provided “a general overview of the Department of State’s role in carrying out U.S. policy with respect to the transfer to foreign governments of detainees held by the Department of Defense at Guantanamo Bay and the process that is followed to ensure that any international obligations and United States policies are properly implemented.” Excerpts relating to evaluation of foreign government treatment assurances and concerns regarding judicial review of transfer decisions follow. Prosper’s full declaration may be found at [www.state.gov/documents/organization/45849.pdf](http://www.state.gov/documents/organization/45849.pdf).

\* \* \* \*

4. Of particular concern to the Department of State in making recommendations on transfers is the question of whether the foreign government concerned will treat the detainee humanely, in a manner consistent with its international obligations, and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion. The Department is particularly mindful of the longstanding policy of United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. This policy is consistent with the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) and the Convention Relating to the Status of Refugees (“Refugee Convention”). The Department of State works closely with the Depart-



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ment of Defense and relevant agencies to advise on the likelihood of persecution or torture in a given country and the adequacy, and credibility of assurances obtained from a particular foreign government prior to any transfer.

5. The Department of State generally has responsibility to communicate on these matters as between the U.S. and foreign governments. The Department of State receives requests from foreign governments for the transfer of detainees and forwards such requests to the Department of Defense for coordination with appropriate Departments and agencies of the United States Government. The Department of State also communicates requests from the United States to foreign governments to accept the transfer of their nationals.

6. Once the Department of Defense has approved a transfer from Guantanamo Bay and requests the assistance of the Department of State, my office would initiate transfer discussions with the foreign government concerned. The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies and to obtain appropriate transfer assurances. My office seeks assurances that the United States Government considers necessary and appropriate for the country in question. Among the assurances sought in every transfer case in which continued detention by the government concerned is foreseen is the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. The Department of State considers whether the State in question is party to the relevant treaties, such as the Torture Convention, and pursues more specific assurances if the State concerned is not a party or other circumstances warrant.

7. Decisions with respect to Guantanamo detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, the individual concerned, and any concerns regarding torture or persecution that may arise. Recommendations by the Department of State are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned. Within the Department of State,



my office, together with the Office of the Legal Adviser, the Bureau of Democracy, Human Rights, and Labor, and the relevant regional bureau, normally evaluate foreign government assurances and any need for protection, and, if deemed appropriate, brief the Secretary or other Department Principals before finalizing the position of the Department of State. The views of the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports, and of the relevant regional bureau, country desk, or U.S. Embassy are important in evaluating foreign government assurances and any individual persecution or torture claims, because they are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel, in general and as they may apply to a particular case in the foreign country concerned, as well as particular information about the entity or individual that is offering the assurance in any particular case.

8. The essential question in evaluating foreign government assurances is whether the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including, *inter alia*, the expressed commitments of officials from the foreign government accepting transfer. When evaluating the adequacy of any assurances, Department officials consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the foreign country concerned that would provide context for the assurances provided. Department officials may also consider U.S. diplomatic relations with the country concerned when evaluating assurances. For instance, Department officials may make a judgment regarding a foreign government's incentives and capacities to fulfill its assurances to the United States, including the importance to the government concerned of maintaining good relations and cooperation with the United States. In an appropriate case, the Department of State may also consider seeking the foreign government's assurance of access by governmental or non-governmental entities in the country con-

cerned to monitor the condition of an individual returned to that country, or of U.S. Government access to the individual for such purposes. In instances in which the United States transfers an individual subject to assurances, it would pursue any credible report and take appropriate action if it had reason to believe that those assurances would not be, or had not been, honored. In an instance in which specific concerns about the treatment an individual may receive cannot be resolved satisfactorily, we have in the past and would in the future recommend against transfer, consistent with the United States policy.

9. The Department of State's ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion. Consistent with the diplomatic sensitivities that surround the Department's communications with foreign governments concerning allegations relating to torture, the Department of State does not unilaterally make public the specific assurances or other precautionary measures obtained in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations. Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even in cases where the assurances are sought to highlight the issue for the country concerned and satisfy the Department that the country is aware of the concerns raised and is in a position to undertake a commitment of humane treatment of a particular individual. There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations.

\* \* \* \*

12. Without addressing the specifics of any particular individual, a court decision to enjoin a detainee transfer, either altogether or until further order of the court, would undermine the United States' ability to reduce the numbers of individuals under U.S. control and our effectiveness in eliciting the cooperation of other governments to bring to justice individuals who are subject to their

jurisdiction. Any judicial decision to review a transfer decision by the United States Government or the diplomatic dialogue with a foreign government concerning the terms of transfer could seriously undermine our foreign relations. Moreover, judicial review of Department of Defense determinations to transfer an individual detainee to a foreign government inevitably would encumber and add delays to what is already a lengthy process. Any judicial review and the resulting delays could undermine a foreign government's ability to prosecute and also harm United States' efforts to press other countries to act more expeditiously in bringing terrorists and their supporters to justice.

*(2) Response to Human Rights Special Rapporteurs*

On October 21, 2005, the United States submitted its response to an inquiry by UN Commission on Human Rights Special Rapporteurs pertaining to Guantanamo detainees. The questions posed by the Special Rapporteurs dealt with many issues on which the United States provided detailed responses in Annex 1 to the Second Periodic Report to the CAT Report, *supra*. For this reason, material is not repeated here responding to the Special Rapporteurs' questions specifically concerning issues such as the legal basis for detentions at Guantanamo, the applicability of international humanitarian law and international human rights law to such detentions, access of detainees to counsel, whether detainees have been adequately informed of the reasons for their detention and any charges brought against them, measures to allow detainees to challenge their detention, requests for lists of detainees, conditions under which the detainees are held, information regarding the release of detainees, methods of interrogation, compensation to victims of mistreatment, investigations of allegations of torture and the prosecution of individuals in cases where such allegations have been substantiated.

The United States provided a more detailed or updated response than that in the CAT Report Annex on certain other questions, including those excerpted below. The text of the

full U.S. response to the UNCHR inquiry is available at  
[www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

\* \* \* \*

*Regarding the request for information about the hunger strike, the United States provides the following information provided by the Department of Defense.*

#### **DoD Treatment of Detainee Hunger Strikers**

- It is DoD policy that all health care personnel have a duty in all matters affecting the physical and mental health of detainees to perform, encourage, and support, directly and indirectly, actions to uphold the humane treatment of detainees. This duty applies similarly in the treatment of detainees who voluntarily chose to engage in a hunger strike.

Refusals of food and water can be expected in any detained population as individuals may use fasting as a form of protest or to demand attention from authorities and the media or interfere with operations.

Prevention of unnecessary loss of life of detainees through standard medical intervention, including involuntary medical intervention when necessary to prevent a detainee's death, using means that are clinically appropriate, is consistent with DOD policy.

It is the policy of Joint Task Force (JTF)—GTMO to closely monitor the health status and avert the deaths of detainees engaged in hunger strikes. Every attempt is made to allow detainees to remain autonomous up to the point where failure to eat or drink might threaten their life or health. Medical personnel do everything in their means to monitor and protect the health and welfare of hunger striking detainees.

\* \* \* \*

*[On questions concerning the treatment of the Koran, t]he United States reported the following information to the Special Rapporteur on Freedom of Religion or Belief on August 17, 2005:*

The Government of the United States welcomes the opportunity to respond to your letter of May 23, 2005, regarding allega-

tions of Koran mishandling at the United States detention facility in Guantanamo Bay, Cuba. The Department of Defense (DoD) completed its investigation into this matter on June 3, 2005. In 31,000 documents covering 28,000 interrogations and countless thousands of interactions with detainees, the DoD investigation found five incidents of apparent mishandling by guards or interrogators. The following information details the circumstances and findings of the investigation.

As President Bush, Secretary Rice, and other officials, including our ambassadors and other personnel around the world, have reiterated, the entire national history of the United States is bound together by a fundamental respect for religious freedom. Desecration of religious texts and objects is repugnant to our common values and anathema to the American people. The Government of the United States maintains its firm commitment to respect for religious freedom as recognized by the First Amendment of the United States Constitution, the International Covenant on Civil and Political Rights, Article 18 of the Universal Declaration of Human Rights, and the Declaration on the Elimination of Discrimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The United States is particularly dedicated to respecting the religious and cultural dignity of the Koran and the detainees' practice of faith.

While detention personnel are required to handle the Koran to conduct periodic security checks and searches, the Department of Defense takes special precautions to ensure that this is handled in a respectful manner. To this end, the Joint Task Force has carefully implemented a standard operating procedure that makes every effort to provide detainees with religious articles associated with the Islamic faith, accommodate prayers and religious periods, and provide culturally acceptable meals and practices. For instance, the Joint Task Force conducts a call to prayer, which is played over the loudspeakers at the appropriate times every day, and there are stenciled arrows pointing in the direction of Mecca which are displayed throughout Guantanamo to assist the detainees in knowing in what direction to pray.

Any incidents of intentional mishandling of the Koran are rare and are never condoned. Procedures have been put into place to

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help ensure respect for the cultural dignity of the Koran and the detainees' practice of faith since early 2003. A copy of the current procedures is attached for your reference.

Your inquiries specifically pertain to allegations of mishandling of the Koran during guard and interrogator interactions with detainees at the Guantanamo Bay detention facility, with specific reference to a claim that a Koran was flushed down the toilet. These allegations were the focus of an in-depth investigation that concluded on June 3, 2005, which aimed to determine the validity of these claims, improve standard operating procedures for handling religious material, and make accountable any individuals who failed to observe the rules in place for handling religious items, including the Koran. This investigation found no credible evidence that a member of U.S. military personnel responsible for providing security for Al Qaeda detainees under U.S. control at Guantanamo Bay, Cuba, known as the Joint Task Force, ever flushed a Koran down the toilet. Further findings in the final report of this investigation are provided herein.

On May 5, 2005, the United States Department of Defense launched a thorough investigation of allegations concerning mishandling of the Koran. This investigation was led by Brigadier General Jay Hood, Commander of the Joint Task Force at Guantanamo Bay, Cuba, who included within the scope of his inquiry all instances of mishandling of the Koran, with specific focus on the allegation that a Koran may have been flushed down a toilet. As part of his investigation, General Hood asked that the following information be compiled:

- Any information pertaining to the allegation that a U.S. service member flushed a Koran down a toilet.
- The documented procedures for handling the Koran from January 2002 to the present.
- Any identified incidents where Joint Task Force personnel failed to follow established procedures.
- Recommendations for changes to be made to the current procedures for handling the Koran and other religious items provided to the detainees at the Guantanamo Bay detention facility.

The United States takes allegations of misconduct seriously. In the course of this investigation, General Hood and his investigators studied all available detainee records, press articles and habeas petitions in search of any information pertaining to the Koran. This involved an examination of over three years worth of records. Based on this investigation, General Hood made the following findings:

There is no credible evidence that a member of the Joint Task Force at Guantanamo Bay ever flushed a Koran down the toilet. An interview with the detainee who reportedly made this allegation revealed that he was not/not a witness to any such mistreatment and no other claims of this type have been made. This matter is considered closed.

Since Korans were first issued to detainees in January 2002, the Joint Task Force has issued more than 1,600 copies, conducted over 28,000 interrogations, and made thousands of cell moves, in which detainees' effects, including Korans, were moved. From those activities, only nineteen incidents involving handling of the Koran by Joint Task Force personnel were identified. Of these nineteen incidents, ten incidents did not involve mishandling of the Koran. Rather, they involved the touching of a Koran during the normal performance of duty. The other nine incidents involved intentional or unintentional mishandling of a Koran. General Hood identified seven incidents (four confirmed) where a guard may have mishandled a Koran. In two additional instances (one confirmed), an interrogator may have mishandled a Koran.

\* \* \* \*

These incidents were investigated and confirmed in accordance with the Standard Operating Procedure for the Joint Task Force at Guantanamo Bay in handling the Koran. Please see the attached annex for excerpts of the relevant sections of these Procedures.

The United States must stress that the large majority of incidents of Koran mishandling thus far have been found to be unintentional and in compliance with standard operating procedures. As part of this investigation, General Hood has determined that the current guidance to the guard force for handling the Koran is adequate, although a number of recommendations for minor modifications are under review. The procedures put into place to help

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ensure respect for the cultural dignity of the Koran and the detainees' practice of faith were crafted in consultation with the International Committee of the Red Cross and have essentially remained unchanged since formal detention operations began in early 2003.

The Government of the United States maintains its respect for religious freedom and continues to be careful in drafting operating guidelines that provide for religious sensitivity in interactions with detainees at Guantanamo Bay. It is important to note the number of Korans (some 1,600) which have been distributed as part of a concerted effort by the US government to facilitate the desires of detainees to freely worship, and the small number of very regrettable incidents should be seen in light of the volume of efforts to facilitate free religious practice.

We hope that the above information addresses your concerns and appreciate your serious attention to this matter.

\* \* \* \*

### Military Commissions

\* \* \* \*

On August 31, 2005, the Secretary of Defense approved several changes to the rules governing military commissions. These changes follow a careful review of commission procedures and take into account a number of factors, including issues that arose in connection with military commission proceedings that began in late 2004.

The principal effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury. Previously, the presiding officer and other panel members together determined findings and sentences, as well as resolved most legal questions.

The new procedures remove the presiding officer from voting on findings and sentencing and give the other panel members sole responsibility for these determinations, while allocating responsibility for ruling on most questions of law to the presiding officer.

The new changes also clarify the provisions governing the presence of the accused at trial and access by the accused to classified information. The new provisions make clear that the accused shall



be present except when necessary to protect classified information and where the presiding officer has concluded that admission of such information in the absence of the accused would not prejudice a fair trial. These changes also make clear that the presiding officer must exclude information from trial if the accused would be denied a full and fair trial from lack of access to the information.

If the accused is denied access to classified information admitted at trial, his military defense counsel will continue to have access to the information. Other changes approved include lengthening the amount of time for the Military Commissions Review Panel to review the trial record of each case.

*The United States stated [in a communication to the United Nations on non-refoulement] dated January 2005 as follows.*

**Non-refoulement.** In its actions involving the possible repatriation of Guantanamo detainees to other countries, the United States takes seriously the principle of *non-refoulement*. It is U.S. policy not to “expel, return (*refouler*) or extradite” individuals to other countries where the United States believes it is “more likely than not” that they will be tortured. In the context of the removal of aliens subject to U.S. immigration procedures in the United States, the President rejected a legislative proposal in September-October 2004 that would have had the effect of permitting the return of certain dangerous aliens even if they were more likely than not to be tortured. The text of a letter from the Counsel to the President Alberto R. Gonzales to the Washington Post, printed in the Washington Post on October 5, 2004, page A24, reads as follows:

“A September 30 front-page article inaccurately reported that the Bush administration supports a provision in the House intelligence reform bill that would permit the deportation of certain foreign nationals to countries where they are likely to be tortured.

The president did not propose and does not support this provision.

He has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against Torture and Other

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### Cruel, Inhuman or Degrading Treatment or Punishment.

Consistent with that treaty, the United States does not expel, return or extradite individuals to countries where the United States believes it is likely that they will be tortured.”

The provision in question was deleted from the final text of the intelligence reorganization bill.

\* \* \* \*

### ***b. U.S. court decisions and proceedings***

#### **(1) Hamdan v. Rumsfeld**

On July 15, 2005, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), reversing a 2004 decision of the district court discussed in *Digest 2004* at 1018-29. Salim Ahmed Hamdan was captured in Afghanistan and designated for trial before a military commission. Contrary to the district court ruling that Hamdan was entitled to relief under the Third Geneva Convention, the court of appeals determined that the “1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court,” 415 F.3d. at 38, and that the Conventions did not apply to Hamdan. *Id.* at 40-42. The court of appeals also held that the military commission that would try Hamdan was authorized by Congress, *id.* at 37-38, and that his trial before the military commissions, as contemplated, would not violate either the Uniform Code of Military Justice (“UCMJ”) or the U.S. Armed Forces regulations implementing the Geneva Conventions. *Id.* at 42-43. On November 7, 2005 the U.S. Supreme Court granted certiorari.\*

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\* On June 29, 2006, as this edition was being prepared for publication, the Supreme Court reversed the decision of the court of appeals and remanded the case for further proceedings. 126 S.Ct. 2749 (2006). Relevant aspects of the Supreme Court’s opinion will be addressed in *Digest 2006*.

(2) Guantanamo Detainee Cases

Pursuant to a September 2004 decision to consolidate habeas cases involving Guantanamo detainees (*see Digest 2004* at 1018), eleven of the thirteen Guantanamo habeas cases pending in the U.S. District Court for the District of Columbia were transferred to Judge Green to address specified common substantive issues. On January 31, 2005, a memorandum opinion and order in these cases granted in part and denied in part the government's motion to dismiss, concluding:

... [T]he Court holds that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied. ...

*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005). Excerpts from the decision follow (footnotes omitted).

Following the January 31 decision, on February 3, 2005, the district court issued a stay in the eleven cases pending the government's appeal. 2005 U.S. Dist. LEXIS 5295 (D.D.C. 2005).

\* \* \* \*

## II. ANALYSIS

The petitioners in these eleven cases allege that the detention at Guantanamo Bay and the conditions thereof violate a variety of laws. All petitions assert violations of the Fifth Amendment, and a majority claim violations of the Alien Tort Claims Act, the Administrative Procedure Act, and the Geneva Conventions. In addition, certain petitions allege violations of the Sixth, Eighth, and Fourteenth Amendments; the War Powers Clause; the Suspension Clause; Army

Regulation 190-8, entitled “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees;” the International Covenant on Civil and Political Rights (“ICCPR”); the American Declaration on the Rights and Duties of Man (“ADRDM”); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the International Labour Organization’s Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; and customary international law. The respondents contend that none of these provisions constitutes a valid basis for any of the petitioners’ claims and seek dismissal of all counts as a matter of law under Fed.R.Civ.P. 12(b)(6) for failing to state a claim upon which relief can be granted. . . .

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#### A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS

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While conceding as they must in light of the *Rasul* decision that this Court has *habeas* jurisdiction over these cases, the respondents assert in their current motion to dismiss that the Supreme Court did not grant *certiorari* to review the D.C. Circuit’s decision that the Guantanamo Bay detainees have no underlying constitutional rights. Accordingly, the respondents argue, the D.C. Circuit’s pronouncement in *Al Odah* that the detainees lack substantive rights is still binding on this Court and the portions of the petitions invoking the Constitution must be dismissed for failure to state a claim upon which relief can be granted. Counsel for the petitioners, on the other hand, assert that in upholding this Court’s *habeas* jurisdiction, the Supreme Court also made clear that the Constitution applies to Guantanamo Bay and that the detainees possess substantive constitutional rights. This Court finds the arguments made on behalf of the petitioners in this regard far more persuasive.

As an initial matter, the conclusion that the D.C. Circuit’s holding on lack of substantive constitutional rights is no longer the law of the case could be deduced merely from the facts that: (1) the appellate court’s opinion emphasized that the existence of *habeas* ju-

jurisdiction and substantive constitutional rights were “directly tied,” 321 F.3d at 1141; (2) the appellate court believed *Eisentrager* applied to the facts of these cases and prevented the detainees from asserting substantive constitutional rights; and (3) the Supreme Court held that *habeas* jurisdiction did in fact exist and that *Eisentrager* was inapplicable to these cases. Additionally, and on a more detailed level, careful examination of the specific language used in *Rasul* reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases.

On appeal to the D.C. Circuit, counsel for the petitioners argued for the application of *Ralpho v. Bell* [569 F.2d 607 (D.C. Cir. 1977)] by challenging the District Court’s finding that Guantanamo Bay was simply another naval base on land leased from a foreign sovereign and nowhere near the legal equivalent of a United States territory. 215 F.Supp.2d at 71. The D.C. Circuit rejected the challenge and agreed with the District Court on this point. . . .

In his concurring opinion in *Rasul*, Justice Kennedy unambiguously repudiated the D.C. Circuit’s analogy of Guantanamo Bay to Landsberg prison, and he made a *Ralpho*-type conclusion that Guantanamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory. He explained:

Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it. *Id.* at 2700

(Kennedy, J., concurring) (*citing Eisentrager*, 339 U.S. at 777-78, 70 S.Ct. 936). Although the majority opinion was not as explicit as Justice Kennedy’s concurrence, it too found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit’s characterization of Guantanamo Bay as nothing more than a foreign mili-

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tary prison. For example, in refusing the application of *Eisentrager's* constitutional analysis to these cases, the majority took special note that, unlike the German prisoners, the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S.Ct. at 2693. Additionally, in rejecting an argument made by respondents that applying the *habeas* statute to prisoners at Guantanamo Bay would violate a canon of statutory interpretation against extraterritorial application of legislation, the majority wrote:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the "territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 124 S.Ct. at 2696. . . .

These passages alone would be sufficient for this Court to recognize the special nature of Guantanamo Bay and, in accordance with *Ralpho v. Bell*, to treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist. But perhaps the strongest basis for recognizing that the detainees have fundamental rights to due process rests at the conclusion of the *Rasul* majority opinion. In summarizing the nature of these actions, the Court recognized:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S.Ct. at 2698 n. 15. This comment stands in sharp contrast to the declaration in *Verdugo-Urquidez* relied upon by the D.C. Circuit in *Al Odah* that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment [has been] emphatic." 494 U.S. at 269, 110 S.Ct. 1056. Given the *Rasul* majority's careful scrutiny of *Eisentrager*, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in *Al Odah* of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional judicial resources in the lower courts. To the contrary, rather than citing *Eisentrager* or even the portion of *Verdugo-Urquidez* that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the *Rasul* Court specifically referenced the portion of Justice Kennedy's concurring opinion in *Verdugo-Urquidez* that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring opinion in *Reid v. Covert*, and Justice Kennedy's own consideration of whether requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous." This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. . . .

Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in

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Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. . . .

\* \* \* \*

In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation—the right not to be deprived of liberty without due process of law—is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court’s decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, and under the precedent set forth in *Verdugo-Urquidez*, *Ralpho*, and the earlier Insular Cases, the respondents’ contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees’ rights under the Due Process Clause of the Fifth Amendment.

### B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT’S DUE PROCESS CLAUSE

. . . Resolution of a due process challenge requires the consideration and weighing of three factors: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing interests of the government, including the financial, administrative, and other burdens that would be incurred were additional safeguards to be provided. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The Supreme Court applied a *Mathews v. Eldridge* analysis in *Hamdi v. Rumsfeld*, — U.S. —, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004), a decision issued the same day as *Rasul* which considered an American citizen’s due process challenge to the U.S. military’s designation of him as an “enemy combatant.” Although none of the detainees in the cases before this Court is an American citizen, the facts under *Hamdi* are otherwise identical in all material respects to those in *Rasul*. Accordingly, *Hamdi* forms both the



starting point and core of this Court's consideration of what process is due to the Guantanamo detainees in these cases.

In addressing the detainee's private interest in *Hamdi* for purposes of the *Mathews v. Eldridge* analysis, the plurality opinion called it "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." 124 S.Ct. at 2646. Although the detainees in the cases before this Court are aliens and are therefore not being detained by their own governments, that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommunicado* from the outside world. . . .

As was the case in *Hamdi*, the potential length of incarceration is highly relevant to the weighing of the individual interests at stake here. The government asserts the right to detain an "enemy combatant" until the war on terrorism has concluded or until the Executive, in its sole discretion, has determined that the individual no longer poses a threat to national security. The government, however, has been unable to inform the Court how long it believes the war on terrorism will last. . . . Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended. . . . At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay. . . . Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror—and thus the period of incarceration—will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.

\* \* \* \*

On the other side of the *Mathews v. Eldridge* analysis is the government's significant interest in safeguarding national security. Having served as the Chief Judge of the United States Foreign Intelligence Surveillance Court (also known as "the FISA Court"), the focus of which involves national security and international terrorism, this Judge is keenly aware of the determined efforts of terrorist groups and others to attack this country and to harm American citizens both at

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home and abroad. Utmost vigilance is crucial for the protection of the United States of America. Of course, one of the government's most important obligations is to safeguard this country and its citizens by ensuring that those who have brought harm upon U.S. interests are not permitted to do so again. Congress itself expressly recognized this when it enacted the [Authorization for Use of Military Force, Pub. L. No. 107-40] AUMF authorizing the President to use all necessary and appropriate force against those responsible for the September 11 attacks. The Supreme Court also gave significant weight to this governmental concern and responsibility in *Hamdi* when it addressed the "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 124 S.Ct. at 2647. The plurality warned against naivete regarding the dangers posed to the United States by terrorists and noted that the legislative and executive branches were in the best positions to deal with those dangers. . . .

Given the existence of competing, highly significant interests on both sides of the equation—the liberty of individuals asserting complete innocence of any terrorist activity versus the obligation of the government to protect this country against terrorist attacks—the question becomes what procedures will help ensure that innocents are not indefinitely held as "enemy combatants" without imposing undue burdens on the military to ensure the security of this nation and its citizens. The four member *Hamdi* plurality answered this question in some detail, and although the two concurring members of the Court, Justice Souter and Justice Ginsburg, emphasized a different basis for ruling in favor of Mr. Hamdi, they indicated their agreement that, at a minimum, he was entitled to the procedural protections set forth by the plurality. *Id.* at 2660.

\* \* \* \*

### **1. General Defects Existing in All Cases Before the Court: Failure to Provide Detainees Access to Material Evidence Upon Which the CSRT Affirmed "Enemy Combatant" Status and Failure to Permit the Assistance of Counsel**

The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an "enemy combatant," and it appears that all of the

CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

\* \* \* \*

[T]he CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights and to require the denial of the respondents' motion to dismiss these cases.

**2. Specific Defects That May Exist in Individual Cases:  
Reliance on Statements Possibly Obtained Through  
Torture or Other Coercion and a Vague and Overly  
Broad Definition of "Enemy Combatant"**

Additional defects in the CSRT procedures support the denial of the respondents' motion to dismiss at least some of the petitions, though these grounds may or may not exist in every case before the Court and though the respondents might ultimately prevail on these issues once the petitioners have been given an opportunity to litigate them fully in the *habeas* proceedings.

**a. Reliance on Statements Possibly Obtained  
Through Torture or Other Coercion**

The first of these specific grounds involves the CSRT's reliance on statements allegedly obtained through torture or otherwise alleged to have been provided by some detainees involuntarily. The Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment. In the landmark case of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Court gave two rationales for this rule: first, "because of the probable unreliability of

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confessions that are obtained in a manner deemed coercive,” and second “because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.’” 378 U.S. at 386, 84 S.Ct. 1774 (*quoting Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960)). *See also Lam v. Kelchner*, 304 F.3d 256, 264 (3rd Cir.2002) (“The voluntariness standard is intended to ensure the reliability of incriminating statements and to deter improper police conduct.”). . . . At a minimum . . . due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture. *See Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir.1997) (citations omitted).

Interpreting the evidence in a light most favorable to the petitioners as the Court must when considering the respondents’ motion to dismiss, it can be reasonably inferred that the CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its “enemy combatant” determinations was coerced from the detainees. . . .

\* \* \* \*

### **b. Vague and Overly Broad Definition of “Enemy Combatant”**

Although the government has been detaining individuals as “enemy combatants” since the issuance of the AUMF in 2001, it apparently did not formally define the term until the July 7, 2004 Order creating the CSRT. The lack of a formal definition seemed to have troubled at least the plurality of the Supreme Court in *Hamdi*, but for purposes of resolving the issues in that case, the plurality considered the government’s definition to be an individual who was “‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan *and* who ‘engaged in an armed conflict against the United States’ there.” 124 S.Ct. 2633, 2639 (*quoting* Brief for the Respondents) (emphasis added). The Court agreed with the government that the AUMF authorizes the Executive to detain individuals falling within that limited definition, *id.*, with the plurality explaining that “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate

force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.” *Id.* at 2641. The plurality cautioned, however, “that indefinite detention for the purpose of interrogation is not authorized” by the AUMF, and added that a congressional grant of authority to the President to use “necessary and appropriate force” might not be properly interpreted to include the authority to detain individuals for the duration of a particular conflict if that conflict does not take a form that is based on “longstanding law-of-war principles.” *Id.*

The definition of “enemy combatant” contained in the Order creating the CSRT is significantly broader than the definition considered in *Hamdi*. According to the definition currently applied by the government, an “enemy combatant” “shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This *includes* any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” July 7, 2004 Order at 1 (emphasis added). Use of the word “includes” indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies. . . .

Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee-by-detainee basis. At this stage of the litigation, however, sufficient allegations have been made by at least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents’ motion to dismiss on the ground that the respondents have employed an overly broad definition of “enemy combatant.” Examples of cases where this issue is readily apparent are *Kurnaz v. Bush*, 04-CV-1135 (ESH), and *El-Banna v. Bush*, 04-CV-1144 (RWR).

\* \* \* \*

. . . Nothing written above should be interpreted to require the immediate release of any detainee, nor should the conclusions reached be considered to have fully resolved whether or not sufficient evidence exists to support the continued detention of any

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petitioner. The respondents' motion to dismiss asserted that no evidence exists and that the petitioners could make no factual allegations which, if taken as true, would permit the litigation of these *habeas* cases to proceed further. For the reasons stated above, the Court has concluded otherwise. The Court, however, has not addressed all arguments made by the petitioners in opposition to the respondents' motion to dismiss, and it may be that the CSRT procedures violate due process requirements for additional reasons not addressed in this Memorandum Opinion. In any event, and as *Hamdi* acknowledged, in the absence of military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a *habeas* petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention. *Id.* at 2651-52. Accordingly, the accompanying Order requests input from counsel regarding how these cases should proceed in light of this Memorandum Opinion.

### D. CLAIMS BASED ON THE GENEVA CONVENTIONS

The petitioners in all of the above captioned cases except *Al Odah v. United States*, 02-CV-0828, have also asserted claims based on the Geneva Conventions, which regulate the treatment of certain prisoners of war and civilians. The respondents contend that all Geneva Convention claims filed by the petitioners must be dismissed because Congress has not enacted any separate legislation specifically granting individuals the right to file private lawsuits based on the Conventions and because the Conventions are not "self-executing," meaning they do not by themselves create such a private right of action. . . . In the alternative, the respondents argue that even if the Geneva Conventions are self-executing, they do not apply to members of al Qaeda because that international terrorist organization is not a state party to the Conventions. . . . Finally, although respondents concede that Afghanistan is a state party to the Conventions and admit that the Geneva Conventions apply to Taliban detainees, they emphasize that President Bush has determined that Taliban fighters are not entitled to prisoner of war status under the Third Geneva Convention and contend that this decision is the final word on the matter. . . .

The Constitution provides that “all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Unless Congress enacts authorizing legislation, however, an individual may seek to enforce a treaty provision only if the treaty expressly or impliedly grants such a right. *See Head Money Cases*, 112 U.S. 580, 598-99, 5 S.Ct. 247, 28 L.Ed. 798 (1884). If a treaty does not create an express right of private enforcement, an implied right might be found by examining the treaty as a whole. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C.Cir.1976).

The Third and Fourth Geneva Conventions do not expressly grant private rights of action, and whether they impliedly create such rights has never been definitively resolved by the D.C. Circuit.

\* \* \* \*

. . . [S]ome of the petitioners in the above-captioned cases are being detained either solely because they were Taliban fighters or because they were associated with both the Taliban and al Qaeda. Significantly, the respondents concede that the Geneva Conventions apply to the Taliban detainees in light of the fact that Afghanistan is a High Contracting Party to the Conventions. . . . They argue in their motion to dismiss, however, that notwithstanding the *application* of the Third Geneva Convention to Taliban detainees, the treaty does not *protect* Taliban detainees because the President has declared that no Taliban fighter is a “prisoner of war” as defined by the Convention. *Id.* The respondents’ argument in this regard must be rejected, however, for the Third Geneva Convention does not permit the determination of prisoner of war status in such a conclusory fashion.

Article 4 of the Third Geneva Convention defines who is considered a “prisoner of war” under the treaty. Paragraph (1) provides that the term “prisoners of war” includes “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.” As provided in Paragraph (2), the definition of “prisoners of war” also includes “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements,” but only if they fulfill the following conditions: “(a) that of being commanded by a person responsible for his subordinates; (b) that



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of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” If there is any doubt as to whether individuals satisfy the Article 4 prerequisites, Article 5 entitles them to be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.” Army Regulation 190-8 created the rules for the “competent tribunal” referenced in Article 5 of the Third Geneva Convention, and the CSRT was established in accordance with that provision. . . .

Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of “prisoners of war.” To the contrary, and as Judge Robertson ruled in *Hamdan*, the President’s broad characterization of how the Taliban generally fought the war in Afghanistan cannot substitute for an Article 5 tribunal’s determination on an individualized basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status. 344 F.Supp.2d at 161-62. Clearly, had an appropriate determination been properly made by an Article 5 tribunal that a petitioner was not a prisoner of war, that petitioner’s claims based on the Third Geneva Convention could not survive the respondents’ motion to dismiss. . . . [T]he Court denies that portion of the respondents’ motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Taliban fighters but who were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.

\* \* \* \*

### (3) Khalid v. Bush

Two Guantanamo detainee habeas cases (*Khalid v. Bush*, 04-CV-1142 and *Boumediene v. Bush*, 04-CV-1166), remained with Judge Leon at the U.S. District Court for the District of Columbia, and on January 19, 2005, the court decided several matters in these cases. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Contrary to the conclusions reached in *Guantanamo Detainee Cases, supra*, the district court granted



the government's motion to dismiss or for a judgment as a matter of law, concluding that "no viable legal theory exists by which it could issue a writ of habeas corpus under these circumstances." *Id.* at 314. Excerpts from the decision follow (footnotes omitted).

\* \* \* \*

Seven . . . foreign nationals [captured outside of Afghanistan and held at Guantanamo] are the petitioners in this case. None are United States citizens or have any connection to the United States, other than their current status as detainees at a U.S. military base. To the contrary, the petitioners are non-resident aliens captured outside of Afghanistan. . . In January 2001, shortly after they were captured and transferred to United States military authorities, the petitioners were transported to Guantanamo, where they currently remain. (citations omitted)

\* \* \* \*

In particular, the petitions challenge the President's authority to issue the November 13, 2001 Detention Order . . . and, even if legal, they claim it is unconstitutional as applied to them because they have been or are being denied their constitutional rights, (citations omitted). Finally, even if those rights are not being violated, they claim their continued detention violates certain federal statutes and international law. . . . In the final analysis, the petitioners are asking this Court to do something no federal court has done before: evaluate the legality of the Executive's capture and detention of non-resident aliens, outside of the United States, during a time of armed conflict.

\* \* \* \*

*A. Congress Authorized the President to Capture and Detain Enemy Combatants.*

Petitioners' initial theory challenging the lawfulness of their detention (i.e., that the President's Detention Order is not authorized by either the Constitution or the AUMF) is, for the following reasons, completely without merit.

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. . . [I]n *Ex parte Quirin*, the Supreme Court clearly articulated the relationship between Congress and the President in declaring and prosecuting armed conflict:

The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, *and to carry into effect all laws passed by Congress* for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war. *Ex parte Quirin*, 317 U.S. 1, 26, 63 S.Ct. 1, 87 L.Ed. 3 (1942) (emphasis added).

The President's ability to make the decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively. Indeed, the Constitution does not delegate to Congress the power to "conduct" or to "make" war; rather, Congress has been given the power to "declare" war. This critical distinction lends considerable support to the President's authority to make the operational and tactical decisions necessary during an ongoing conflict. Moreover, there can be no doubt that the President's power to act at a time of armed conflict is at its strongest when Congress has specifically authorized the President to act. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) (noting that the President's powers "fluctuate, depending upon their disjunction or conjunction with those of Congress").

Thus, when Congress, through the AUMF, authorized the President "to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks [of 9/11]" "to prevent any future acts of international terrorism against the United States by such . . . persons[,]" *see* AUMF § 2, it, in effect, gave the President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks. Indeed, the President's war powers could not be reasonably interpreted otherwise.

The history of armed conflict in which this Nation has engaged since our inception has firmly established that the President's "war power" *must* include the power to capture and detain our enemies. Indeed, the Supreme Court acknowledged as much in its recent decision in *Hamdi v. Rumsfeld*. *Hamdi v. Rumsfeld*, 542 U.S. 507, —, 124 S.Ct. 2633, 2640, 159 L.Ed.2d 578 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war.") (internal quotations omitted); *see also, e.g., Fleming v. Page*, 50 U.S. (9 How.) 603, 615, 13 L.Ed. 276 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and *conquer and subdue* the enemy.") (emphasis added).

Moreover, the petitioners' contention, in effect, that the President's conduct is illegally excessive because Congress did not *expressly* authorize the detention of enemy combatants not captured on or near the battlefields of Afghanistan is fanciful, at best.

The Supreme Court, in *Hamdi*, made clear that specific Congressional authorization of detention is unnecessary "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and, thus, permitted by Congress under the clause of the AUMF authorizing the President to use "necessary and appropriate force." *Hamdi*, 124 S.Ct. at 2641; *see also Dames & Moore v. Regan*, 453 U.S. 654, 678, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act[.]"). In addition, with respect to the duration of detention, the Supreme Court found that it is an equally clear and well-established principle of the law of war that detention may last for the duration of active hostilities, *Hamdi*, 124 S.Ct. at 2641 (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364), and, thus, the Supreme Court interpreted the AUMF to mean that Congress has granted the President the authority to detain enemy combatants for the duration of the current con-

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flict, *id.* (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict[.]”).

\* \* \* \*

Thus, for all of these reasons, the Court finds that the President’s Detention Order was lawful under the AUMF and consistent with his war powers under the Constitution. . . .

### ***B. Non-Resident Aliens Captured and Detained Outside the United States Have No Cognizable Constitutional Rights.***

Petitioners’ next theoretical basis for challenging the lawfulness of their continued detention under the habeas statute is their contention that it violates their substantive rights under the United States Constitution (e.g., due process, right to confrontation, right to counsel, and protection against cruel and unusual punishment). (citations omitted) This argument, of course, *presupposes* that non-resident aliens captured outside of the United States and held at a military base that is not located on sovereign U.S. territory enjoy such rights. Notwithstanding the Supreme Court’s unequivocal and repeated denial of such rights to such non-resident aliens, *see infra*, petitioners cling to an expansive interpretation of the Supreme Court’s recent opinion in *Rasul* as authority for this novel proposition. For the following reasons, the Court rejects the petitioners’ interpretation of *Rasul* and, relying upon a long line of Supreme Court opinions, holds that non-resident aliens captured and detained pursuant to the AUMF and the President’s Detention Order have no viable constitutional basis to seek a writ of habeas corpus. The petitioners in this case are neither United States citizens nor aliens located within sovereign United States territory. To the contrary, they are non-resident aliens, captured in foreign territory, and held at a naval base, which is located on land subject to the “ultimate sovereignty” of Cuba. *See* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. Due to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the petitioners possess no cognizable constitutional rights. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85, 70 S.Ct. 936, 94 L.Ed. 1255 (1950); *United States v. Curtiss-Wright Export Corp.*, 299 U.S.

304, 318, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.”).

\* \* \* \*

The Supreme Court . . . engaged in an extensive discussion specifically regarding the constitutional right to habeas afforded to our citizens, and the absence of such rights afforded to non-resident aliens. [*Eisentrager*] at 770-71, 70 S.Ct. 936. In the final analysis, the lynchpin for extending constitutional protections beyond the citizenry to aliens was and remains “the alien’s presence within its territorial jurisdiction.” *Id.* at 771, 70 S.Ct. 936 (“Mere lawful presence in the country . . . gives [the alien] certain rights[.]”).

The Supreme Court, thereafter, repeatedly reaffirmed its holding in *Eisentrager*. *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (“Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases [conferring constitutional rights on aliens] avail him not.”). And similarly, our Circuit Court has repeatedly held that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” 32 *County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C.Cir.2002) (quoting *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C.Cir.1999)); *see also, e.g.*, *Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C.Cir.2004) (“The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.”); *Pauling v. McElroy*, 278 F.2d 252, 254 n. 3 (D.C.Cir.1960) (“The non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States.”).

\* \* \* \*

Nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny. The Supreme Court majority in *Rasul* expressly

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limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute, *Rasul*, 124 S.Ct. at 2693 (“The question now before us is whether the *habeas statute* confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”) (emphasis added), and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights. Indeed, the *Rasul* majority went on to distinguish *Eisentrager* on grounds that *Eisentrager* was primarily concerned with whether the prisoners had any *constitutional* rights that could be vindicated via a writ of habeas corpus. *Id.* at 2693-94 (“The [*Eisentrager*] Court had far less to say on the question of the petitioners’ *statutory* entitlement to habeas review.”) (emphasis in original). Thus, by focusing on the petitioners’ statutory *right* to file a writ of habeas corpus, the *Rasul* majority left intact the holding in *Eisentrager* and its progeny.

\* \* \* \*

### *C. Petitioners Have Failed to Identify any United States Law or Treaty the Violation of Which Would Provide a Viable Basis to Grant a Habeas Petition.*

Having no constitutional rights upon which to base the issuance of a habeas petition, petitioners next seek to rely upon alleged violations of certain legal statutes and treaties as the basis for the issuance of a writ. In doing so, of course, they must demonstrate that the violation of that law or treaty would in turn render the petitioners’ *custody* unlawful. *See* 28 U.S.C. § 2241(c)(3) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in *custody* in violation of the Constitution or laws or treaties of the United States[.]”) (emphasis added). . . . The crux of the petitioners’ allegations is the amorphous contention that their detention somehow violates certain federal laws (e.g., the War Crimes Act, 18 U.S.C. § 2441(a), (c)(1); Alien Tort Claims Act, 28 U.S.C. § 1350), because they: (1) have been held “virtually incommunicado,” (2) “have been or will be interrogated repeatedly . . . though they have not been charged with an offense,” and (3) have been held “in accommodation[s] that fail[ ] to satisfy both domestic and interna-

tionally accepted standards of accommodation for any person subject to detention.” . . .

\* \* \* \*

[P]etitioners have offered no viable theory regarding any treaty that could serve as the basis for the issuance of a writ. Although the petitioners assert that their continued detention violates the Geneva Convention, . . . they subsequently conceded at oral argument that that Convention does not apply because these petitioners were not captured in the “zone of hostilities . . . in and around Afghanistan.” . . . As a result, petitioners are left contending that their detention unlawfully violates other United States treaties because their living conditions, in effect, constitute “torture” as that term is defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984) (“CAT”) and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (“ICCPR”). *See* Pet. Jt. Supp. Br., pp. 32-35. For the following reasons, however, these claims are not a viable basis in a habeas proceeding to evaluate the legality of the petitioners’ detention.

Treaties, as a general rule, are not privately enforceable. Indeed, enforcement in the final analysis is reserved to the executive authority of the governments who are parties to the treaties. . . . Where a treaty is not self-executing, its terms give rise to a private cause of action *only* if Congress enacts authorizing legislation. . . . In the absence of a self-executing treaty and Congressional implementation, the individual does not have standing to assert the alleged violation in federal court. . . .

In this case, neither the CAT nor the ICCPR is a self-executing treaty. Indeed, in giving its advice and consent to ratification of both treaties, the Senate expressly declared that the provisions of both would *not* be privately enforceable. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990) (dealing with the CAT); 138 Cong. Rec. S4781-01 (April 2, 1992) (dealing with the ICCPR). Furthermore, Congress has not enacted any implementing legislation, with respect to either convention, that would authorize the petitioners to challenge the legality of their detention in federal court. *See Wesson*



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*v. U.S. Penitentiary Beaumont*, TX, 305 F.3d 343, 348 (5th Cir.2002) (“Habeas relief is not available for a violation of the [ICCPR] because Congress has not enacted implementing legislation.”). As a result, the petitioners cannot rely on either the CAT or the ICCPR as a viable legal basis to support the issuance of a writ of habeas corpus. Accordingly, the Court finds no viable theory based on United States treaties upon which a writ could be issued.

### ***D. There is No Viable Legal Theory under International Law upon Which This Court Could Issue a Writ of Habeas Corpus.***

Because the petitioners’ claims under the aforementioned treaties fail, they are left to rely in the final analysis on principles of international law for a viable theory by which to challenge the lawfulness of their detention. This effort, similarly, is to no avail. . . .

\* \* \* \*

While a state of war certainly does not give the President a “blank check,” *see Hamdi*, 124 S.Ct. at 2650, and the courts must have some role when individual liberty is at stake, *see Mistretta v. United States*, 488 U.S. 361, 380, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), any role must be limited when, as here, there is an ongoing armed conflict and the individuals challenging their detention are non-resident aliens, *see, e.g., Yamashita*, 327 U.S. at 8-9, 66 S.Ct. 340.

Thus, to the extent these non-resident detainees have rights, they are subject to both the military review process already in place and the laws Congress has passed defining the appropriate scope of military conduct towards these detainees. The extent to which these rights and conditions should be modified or extended is a matter for the political branches to determine and effectuate through either Constitutional amendments, federal laws, or treaties with the appropriate international entities. Thus, until Congress and the President act further, there is similarly no viable legal theory under international law by which a federal court could issue a writ.

### ***(4) Other detainee cases***

Several cases in the U.S. District Court for the District of Columbia addressed motions brought by petitioner-detainees for preliminary injunctions. Such requests for the



most part sought thirty-day advance notice of any attempt by the government to transfer detainees to foreign countries where, they alleged, they would face torture or indefinite imprisonment without due process of law.\* On March 29, 2005, in *Abdah v. Bush*, 2005 U.S. Dist. LEXIS 14024 (D.D.C. 2005), the court granted detainees' request for a preliminary injunction, and required the government to provide thirty days notice to petitioners prior to any intended removal of petitioners from Guantanamo. See also *Ahmed v. Bush*, 2005 U.S. Dist. LEXIS 14024 (D.D.C. July 8, 2005) (granting the government's motion to stay the case pending the resolution of appeals in *In re Guantanamo Detainee Cases* and *Khalid v. Bush*, both discussed *supra*) "except that petitioners may seek emergency relief from this court in appropriate circumstances, such as when petitioners have reason to believe that they are facing the possibility of continued detention at the request of the United States in a location that does not provide access to this court," and ordering the government to provide the court thirty days' notice of any transfer or removal of the petitioner from U.S. custody at Guantanamo). In addition, in an unpublished order of April 7, 2005, the district court in *El Mashad v. Bush* barred the release, repatriation, or rendition of a Guantanamo detainee pending further order from the court. *El-Mashad v. Bush*, No. 05-0270 (D.D.C. 2005), available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

The district court refused to grant such preliminary injunctions to the petitioners in several other cases. See *Almurbati v. Bush*, 366 F. Supp. 2d 72 (D.D.C. 2005) (denying the petitioners' motion for a preliminary injunction and ordering the government to submit a declaration to the court "certifying that any transfers or repatriations were not made

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\* The declaration of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, concerning U.S. policy on transfers of detainees to foreign governments and the negative effect of a court decision to enjoin a detainee transfer, was filed in several relevant cases. Ambassador Prosper's declaration is excerpted in 3.a.(1), *supra*. The full text is available as Tab 1 to Annex 1 of the second U.S. report to the Committee Against Torture, available at [www.state.gov/g/drl/rls/45738.htm](http://www.state.gov/g/drl/rls/45738.htm).

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for the purpose of merely continuing the petitioners' detention on behalf of the United States or for the purpose of extinguishing this Court of jurisdiction over the petitioners' actions for habeas relief for a reason unrelated to the decision that the petitioners' detention is no longer warranted by the United States"). *See also O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005) (denying petitioner's motion for a preliminary injunction against interrogation, torture or other cruel or degrading treatment, and denying petitioner's motion for preliminary injunction requiring thirty days' notice of transfer to a foreign state); *Al-Anazi v. Bush*, 370 F. Supp. 2d 188 (D.D.C. 2005) (denying petitioners' motion for preliminary injunction and granting the government's motion to stay the case pending the resolution of appeals in *In re Guantanamo Detainee Cases* and *Khalid v. Bush*).

As noted in the combined Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights excerpted in Chapter 6.A.2., on February 28, 2005, a federal district court held that the Non-Detention Act, 18 U.S.C. § 4001(a), forbids the federal government from detaining Jose Padilla as an "enemy combatant" and that the President lacked any inherent constitutional authority to do so. *Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921 (D.S.C. Feb. 2005). On September 9, 2005, the Fourth Circuit Court of Appeals reversed that decision, principally on the basis of Presidential authority provided by the Congressional Authorization for Use of Military Force Joint Resolution (115 Stat. 224). 423 F.3d 386 (4th Cir. 2005).

### (5) *Freedom of Information Act cases*

#### (i) *Associated Press v. Department of Defense*

On August 29, 2005, the U.S. District Court for the Southern District of New York ordered the Department of Defense ("DOD") to question detainees held at Guantanamo Bay, Cuba, as to whether they wished their personal information to

be released to the Associated Press. *Associated Press v. Department of Defense*, 395 F. Supp. 2d 15, 17 (S.D.N.Y. 2005). In this case, DOD had responded to a Freedom of Information Act (“FOIA”) request from the Associated Press by providing redacted materials, stating that the redactions were necessary for detainee protection. Excerpts follow (footnote omitted).

\* \* \* \*

In November 2004, the Associated Press submitted a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the transcripts of the [Combatant Status Review] Tribunals’ proceedings and related documentation. When more than five months passed without any transcripts being released, the Associated Press brought this lawsuit, on April 19, 2005, seeking to compel such release. In response, the Department of Defense produced the requested transcripts and other documentation, but with various redactions, most of which related, directly or indirectly, to the detainees’ identities.

Contending that these redactions were proper under FOIA and that it has therefore provided the Associated Press with all that FOIA requires, the Department of Defense now moves for summary judgment in its favor. It is critical to note that the Department of Defense does not claim that any of the redactions were required by national security. The claim, rather, is that the redactions fall under FOIA’s Exemption 6, which permits the withholding of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). In seeking to show that disclosure of the identifying information would be “clearly unwarranted” in terms of Exemption 6, the Department of Defense hypothesizes that if “terrorist groups or other individuals abroad are displeased by something the detainee said to the Tribunal, [the Department of Defense] believes that this could put his family at serious risk of reprisals—including death or serious harm—at home. This risk also translates to the detainee himself when he is released from detention.” Declaration of Karen L. Hecker, Associate Deputy Counsel of the Department of Defense, dated June 30, 2004, at ¶ 9. The

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Government, in other words, seeks to act as a surrogate for the detainees and safeguard their identities for what it believes is their own good and the good of their families.

\* \* \* \*

[I]n order that the Court may be in an informed position to decide the pending motion, the Court directs the Department of Defense to ask the detainees in question whether they wish the redacted information relating to their identities to be released to the Associated Press or not. . . . Specifically, the Court directs the Department of Defense to submit to the Court, by no later than September 2, 2005, a proposed written form of no more than one page that explains the situation (in language sufficiently simple that, even after being translated into each detainee's native tongue, it can be easily understood) and asks each detainee to check "yes" or "no" as to whether he wishes the relevant identifying information to be disclosed to the Associated Press. . . . Based on the responses (a summary of which should be submitted by the Government to the Court, in affidavit form, by no later than October 7, 2005), the Court will then be in a position to further address the pending motion.

### (ii) American Civil Liberties Union v. Department of Defense

On September 29, 2005, the United States District Court for the Southern District of New York issued a decision in *American Civil Liberties Union v. Department of Defense*. 389 F. Supp. 2d 547 (S.D.N.Y. 2005). The American Civil Liberties Union ("ACLU") brought an action against DOD pursuant to the FOIA, demanding that the government produce documents concerning detainee treatment and the death and torture of detainees allegedly held by DOD and the Central Intelligence Agency ("CIA"). The court held that certain documents related to the International Committee of the Red Cross ("ICRC") were exempt from disclosure under FOIA; however, when redacted, certain photographs and videotapes depicting abuse were not exempt from disclosure. Among other issues, the court also determined that the CIA's "Glomar" response (a response by which the Agency neither admits nor denies that it possesses a requested document) regarding CIA interrogation techniques

was justified to protect intelligence sources and methods, but that the CIA's Glomar response with regard to a Department of Justice memorandum requesting CIA's interpretation of the Convention Against Torture was not. Excerpts addressing the ICRC-related documents and the photographs and video tapes follow (footnotes omitted).

\* \* \* \*

*I. International Committee of the Red Cross Documents*

. . . The relevant statute, 10 U.S.C. § 130c, authorizes the withholding of "sensitive information" to the extent such withholding is requested by a foreign government or international organization. *See* 10 U.S.C. § 130c(a). Section 130c provides that if the information was "provided by, otherwise made available by, or produced in cooperation with" the foreign government or international organization, and certain other criteria are satisfied, the information may be exempted from release by the United States government. . . .

\* \* \* \*

. . . [With regard to the] reports delivered by the ICRC to DOD[:] . . . Such reports clearly fall within the scope of 10 U.S.C. § 130c and accordingly, they are covered by FOIA Exemption 3. At oral argument, plaintiffs conceded that the ICRC reports were properly exempted under the statute, and I so ruled. . . .

\* \* \* \*

The ICRC represented that it maintained, and requested that the United States government likewise maintain, confidentiality with respect to the disputed information . . . [A letter from the Deputy Head of ICRC's Delegation for United States and Canada] states that "the ICRC itself is withholding such documents from public disclosure." The requirements of § 130c(b)(2) and (b)(3) are thus satisfied.

\* \* \* \*

The documents sampled essentially contained responses by DOD to the observations reported by the ICRC, thereby exposing

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the information “provided by” the ICRC. Just as an attorney’s responses to a client’s requests for advice are privileged . . . so the DOD’s responses to the ICRC are exempt, for otherwise the ICRC’s request for confidentiality would be compromised.

\* \* \* \*

### *V. The Darby and Related Photographs of Abuse of Detainees*

Plaintiffs and defendants seek summary judgment with respect to DOD’s withholding of certain photographs and videotapes depicting abuse of detainees . . . in Guantánamo Bay and Iraq. Oral argument focused on [one item] which requested a “report of Detainee mistreatment and a CD with photographs that Joseph Darby, a military policeman assigned to Abu Ghraib, provided to the Army’s Criminal Investigations Division.” The government initially represented that 144 original photographs and four movies were responsive, and that the images “were taken for personal, rather than official, purposes.” [citation omitted]

\* \* \* \*

#### *(a) Exemptions 6 and 7(C)*

The government, contending that FOIA Exemptions 6, 7(C), and 7(F), 5 U.S.C. § 552(b)(6), (b)(7)(C), (b)(7)(F), apply, opposes the release of the Darby photographs. Exemption 6 exempts: personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

\* \* \* \*

I am satisfied from my review that publication of redacted photographs will not constitute an “unwarranted invasion of personal privacy,” since all identifying characteristics of the persons in the photographs have been redacted, and therefore, as a preliminary matter, I do not find a cognizable “invasion of personal privacy.” If, as the government argues, the protagonists might recognize themselves in re-publications of the photographs, or be recognized by members of the public, . . . even without identifying characteristics being revealed, that possibility is no more than speculative, a speculation which could apply equally to textual descriptions without pictures.

\* \* \* \*

Moreover, even were I to find an “invasion of personal privacy,” any further intrusion into the personal privacy of the detainees by redacted publications would be, with the exception of the small number described above, minimal and, under a balancing analysis, not “unwarranted” in light of the public interest policy of FOIA. The Supreme Court has set forth its most recent iteration of the balancing analysis under Exemption 7(C) in *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004); *see also Reporters Committee*, 489 U.S. at 772, 109 S.Ct. 1468. . . .

\* \* \* \*

With the exception of the small number of Darby photographs that I ordered to be withheld, where the risk of exposure is too great and the informational value is minimal, the balancing analysis weighs in favor of disclosure in the present case. There is a substantial public interest in these pictures, evidenced by the active public debate engendered by the versions previously leaked to the press, or otherwise obtained by the media. . . . Moreover, the government concedes that wrongful conduct has occurred. Defs.’ Br., at 70-72. Plaintiffs assert that they seek release of the Darby photographs to inform and educate the public, and to spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison and, possibly, by extension, to other prisons in Iraq, Afghanistan, Guantánamo, and perhaps elsewhere. These are the very purposes that FOIA is intended to advance. The photographs are sought to “shed[ ] light on an agency’s performance of its statutory duties” and to “contribut[e] significantly to public understanding of the operations or activities of the government.” Pls.’ Reply Br., at 24 (quoting *Reporters Committee*, 489 U.S. at 773 & 775, 109 S.Ct. 1468). As I remarked at oral argument:

photographs present a different level of detail and a different medium, and are the best evidence that the public could have as to what occurred at a particular time, better than testimony, which can be self-serving, better than summaries, which can be misleading, and better even than a

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full description no matter how complete that description might be. [citation omitted] There is no alternative, less intrusive means by which the information may be elicited. *See, e.g., Dep't of Def. Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 29-30 (D.C.Cir.1992). The redacted originals, rather than piece-meal leaks and possibly partial depictions of several of the pictures, are more probative of what Darby and his fellow military personnel actually did. Under the requirements of *Favish*, the claimed public interest in production of the redacted photographs is substantiated and far outweighs any speculative invasion of personal privacy.

The government also opposes production because, it argues, doing so would conflict with the United States' obligations under the Geneva Conventions. The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention") provides that a detaining power must protect a prisoner of war "particularly against acts of violence or intimidation and against insults and public curiosity." Art. 13. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the "Fourth Geneva Convention") provides that civilians under detention are entitled to "respect for their persons, their honor . . . shall at all times be treated humanely, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Art. 27. Defendants present evidence that the United States historically has interpreted these two conventions to forbid the taking and publishing of photographs of detainees, *see* Decl. of Edward R. Cummings, Ass't Legal Adviser for Arms Control and Verification, Dep't of State, dated Mar. 24, 2005, ¶¶ 12-17 [hereinafter Cummings Decl.], and argue that publication of the photographs in this case would conflict with the United States' treaty obligations thereunder. *See id.* ¶ 19; Decl. of Geoffrey S. Corn, Special Ass't to Judge Advocate Gen. for Law of War Matters, Dep't of Army, dated Mar. 25, 2005, ¶¶ 10-11 [hereinafter Corn Decl.]. The government's treaty interpretations are entitled to respect. *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) ("While courts



interpret treaties for themselves, the meaning given to them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”).

The government argues that “[e]ven if the identities of the subjects of the photographs are never established,” those subjects could suffer humiliation and indignity against which the Geneva Conventions were intended to protect. Corn Decl. ¶ 11. It also states, without supporting documentation, that the ICRC has taken the position that the Third Geneva Convention forbids publishing images that “show prisoners of war in degrading or humiliating positions or allow the identification of individual POWs.” Cummings Decl. ¶ 17. The redactions and withholding that I ordered should protect civilians and detainees against “insults and public curiosity” and preserve their “honor.” Production of these images coheres with the central purpose of FOIA, to “promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed,” *Nat’l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir.2005). Accordingly, I hold that the government may not withhold the Darby photographs, redacted to eliminate all identifying characteristics of the persons shown in the photographs, under Exemptions 6 and 7(C).

*(c) The Government’s Supplemental Argument: Exemption 7(F)*

On July 28, 2005, more than two months after the motion was initially argued, the government added another ground of claimed exemption, Exemption 7(F), to supplement its opposition to production of the Darby photographs. Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), exempts records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (F) could reasonably be expected to endanger the life or physical safety of any individual.

\* \* \* \*

The government contends that publication of the Darby photographs pursuant to court order is likely to incite violence against our troops and Iraqi and Afghan personnel and civilians, and that redactions will not avert the danger. . . .

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Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. . . .

\* \* \* \*

In its most recent discussion of FOIA, the Supreme Court commented that “FOIA is often explained as a means for citizens to know what ‘their Government is up to.’ The sentiment is far from a convenient formalism. It defines a structural necessity in a real democracy.” *Favish*, 541 U.S. at 171-72, 124 S.Ct. 1570. As President Bush said, we fight to spread freedom so the freedoms of Americans will be made more secure. It is in compliance with these principles, enunciated by both the President and the highest court in the land, that I order the government to produce the Darby photographs that I have determined are responsive and appropriately redacted.

\* \* \* \*

The March 24, 2005, declaration of Edward Cummings, Assistant Legal Adviser, U.S. Department of State, discussed in the opinion, set forth the U.S. view that the publication of the photographs at issue would violate the obligations of the United States under the Geneva Conventions. Excerpts from Mr. Cummings’ declaration follow (footnotes omitted); the full text is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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\* \* \* \*

The purpose of this declaration is to set forth an analysis of legal issues related to the release of photographs of individuals detained by the U.S. Army at the Abu Ghraib prison in Iraq and U.S. legal obligations under the Third and Fourth Geneva Conventions. . . .

\* \* \* \*

### A. Relevant International Obligations

(8) Common Article 2 of all four of the Geneva Conventions of 1949 provides that the Conventions apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Common Article 2 further

states that the Conventions shall also apply “to all cases of partial or total occupation of the territory of a High Contracting Party.”

(9) The United States and Iraq are High Contracting Parties to each of these Conventions. The photographs at issue depict images of individuals who were in the custody of U.S. forces in Iraq during the period of armed conflict and belligerent occupation of Iraq. Thus, relevant provisions of the Geneva Conventions apply to the disposition of these photographs.

(10) With regard to prisoners of war, Article 13 of the Third Geneva Convention requires that a Detaining Power with custody over a prisoner of war must protect that prisoner of war, “particularly against acts of violence or intimidation and against insults and public curiosity.”

(11) With regard to protected persons detained by a Party to an armed conflict or by an Occupying Power of which they are not nationals, Article 27 of the Fourth Geneva Convention states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be treated humanely, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

#### B. State Practice Regarding Release of Photographs

(12) Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention do not expressly address the taking of pictures and publication of photographs of prisoners of war or protected persons. There may be certain circumstances in which the publication of photographs of detainees would not run afoul of the Geneva Conventions, as, for instance, when detainees are not individually identifiable and the photographs do not show detainees in degrading or humiliating situations. However, where the protection of the dignity of prisoners of war or detainees might be undercut by photographing them and publishing the photographs (in newspapers or journals, for example), the U.S. Government historically has interpreted these Articles to mean that such publication would be holding detainees up to public curiosity and therefore would be forbidden. Where, as here, the photographs requested are of the abuse

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or mistreatment of detainees, such images would, by definition, depict detainees in degrading or humiliating positions or situations. Release of such photographs would be inconsistent with the obligations of the United States under Third and Fourth Geneva Conventions, as the United States has traditionally interpreted those obligations, because the release would subject the detainees depicted in the photographs to public curiosity.

(13) For example, the United States traditionally has protested the parading of American prisoners of war (as in Hanoi in 1966) or exposing prisoners of war on television. President George Bush described the “brutal parading” of Allied pilots by Iraq in January 1991 as a violation of the Geneva Conventions [citing 2 Dep’t St. Dispatch No. 4 (Jan. 28, 1991), available at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1991/html/Dispatchv2no04.html>]. In a formal protest to the Government of Iraq, the United States stated that “. . . unlawful coercion and misuse of prisoners of war for propaganda purposes, the failure to respect their honor and well-being, and the subjection of such individuals to public humiliation” were violations of the Geneva Conventions.

(14) In 2003, several photographs were published of the in-processing of detainees into Guantanamo. After strong international criticism of the Guantanamo photographs, DOD issued specific guidelines on the kind of photographs that would be permitted. The Guantanamo guidelines state that “(t)he policy of limiting photography is in accord with treating detainees consistent with the protections provided under the Third Geneva Convention. This is not a change in policy. It is in conformity with long-standing U.S. procedures and practice.” . . .

(15) These guidelines were consistent with guidelines in long-standing military regulations on prisoners of war. Specifically, Army Regulation 190-8, paragraph 1-5d provides, “photographing, filming, and video taping of individual [enemy prisoners of war, civilian internees and retained personnel] for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of [enemy prisoners of war, civilian internees and retained personnel] or facilities will be taken unless ap-

proved by the senior Military Police officer in the Internment Facility commander's chain of command." Paragraph 1-9 further provides, "In the interest of national security, and the protection of the prisoners from public curiosity, and in adherence to the [Third and Fourth Geneva Conventions], [enemy prisoners of war, civilian internees and retained personnel] and other detainees will not be photographed as per paragraph 1-5d." . . .

(16) DOD issued similar guidelines in connection with embedded news media and the conflict in Iraq. Those guidelines provide that "no photographs or other visual media showing an enemy prisoner of war or detainee's recognizable face, name tag or other identifying feature or item may be taken." It also prohibits "still or video imagery of custody operations or interviews with persons under custody."

(17) In addition to the practice of States, the International Committee for the Red Cross ("ICRC") has had a significant influence on the interpretation of Article 13. The ICRC, which focuses on preserving the integrity and dignity of individuals in detention, generally has taken the view that Article 13 of the Third Geneva Convention requires parties to a conflict to avoid publication of images that show prisoners of war in degrading or humiliating positions or allow the identification of individual POWs.

(18) Images such as group photographs that neither identify individuals nor show mistreatment are generally less objectionable. The practice of High Contracting Parties as well as neutral organization such as the ICRC suggest that such images do not provoke the level of protest that images that degrade or identify prisoners do.

In conclusion, given my understanding of the content of the photographs at issue, which not only permit identification of individual detainees protected by the Third or Fourth Conventions, but which also show detainees in positions that the U.S. Government believes are humiliating or degrading, I believe that the public release of these photographs would conflict with the obligations of the U.S. Government as a High Contracting Party to the Third and Fourth Geneva Conventions.

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### *c. Detainee Treatment Act*

On December 30, 2005, President Bush signed into law the Department of Defense Appropriations Act for Fiscal Year 2006, which included the Detainee Treatment Act of 2005. Pub.L. No.109-148, Title X, 119 Stat. 2680. The Detainee Treatment Act included, among other things (1) provisions on standards for the interrogation of detainees, (2) prohibitions on cruel, inhuman or degrading treatment or punishment, (3) reporting requirements on the Department of Defense's Combatant Status Review Tribunals and jurisdictional provisions governing review of final decisions by both the Combatant Status Review Tribunals and Military Commissions; and (4) the training of Iraqi forces regarding detainee treatment. Major excerpts follow.

\* \* \* \*

#### SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

- (a) In General—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.
- (b) Applicability—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.
- (c) Construction—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR  
DEGRADING TREATMENT OR PUNISHMENT OF  
PERSONS UNDER CUSTODY OR CONTROL OF THE  
UNITED STATES GOVERNMENT.

- (a) In General—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
- (b) Construction—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.
- (c) Limitation on Supersedure—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.
- (d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined—In this section, the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES  
GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED  
INTERROGATIONS.

- (a) Protection of United States Government Personnel—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent’s engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a

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serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

\* \* \* \*

### SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

- (a) Submittal of Procedures for Status Review of Detainees at Guantanamo Bay, Cuba, and in Afghanistan and Iraq—
  - (1) IN GENERAL—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—
    - (A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and
    - (B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.



- (2) DESIGNATED CIVILIAN OFFICIAL—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the ‘Designated Civilian Official’) shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.
- (3) CONSIDERATION OF NEW EVIDENCE—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.
- (b) Consideration of Statements Derived With Coercion—
  - (1) ASSESSMENT—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—
    - (A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and
    - (B) the probative value (if any) of any such statement.
  - (2) APPLICABILITY—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

\* \* \* \*

- (e) Judicial Review of Detention of Enemy Combatants—
  - (1) IN GENERAL—Section 2241 of title 28, United States Code, is amended by adding at the end the following:
    - “(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
      - “(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

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“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant. . . .”

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION-

(A) IN GENERAL—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and

- (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.
- (D) **TERMINATION ON RELEASE FROM CUSTODY**—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.
- (3) **REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS**—
  - (A) **IN GENERAL**—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).
  - (B) **GRANT OF REVIEW**—Review under this paragraph—
    - (i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or
    - (ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.
  - (C) **LIMITATION ON APPEALS**—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—
    - (i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and
    - (ii) for whom a final decision has been rendered pursuant to such military order.
  - (D) **SCOPE OF REVIEW**—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an ap-

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peal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

- (i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and
  - (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.
- (4) **RESPONDENT**—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.
- (f) **Construction**—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.
- (g) **United States Defined**—For purposes of this section, the term ‘United States’, when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.
- (h) **Effective Date**—
- (1) **IN GENERAL**—This section shall take effect on the date of the enactment of this Act.
- (2) **REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS**—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

### SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

- (a) **Required Policies**—
- (1) **IN GENERAL**—The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facili-

ties of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

\* \* \* \*

In a statement issued by President George W. Bush on December 30, 2005, the day he signed the DTA into law as part of Pub. L. No. 109-148, President Bush commented on the DTA as follows. The full text of the signing statement is available at [www.whitehouse.gov/news/releases/2005/12/20051230-8.html](http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html).

\* \* \* \*

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v. Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section

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1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.

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In a second statement also released on December 30, President Bush commented further on the DTA provisions, as excerpted below. The full text of this statement is available at [www.whitehouse.gov/news/releases/2005/12/20051230-9.html](http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html).

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. . . The detention and interrogation of captured terrorists are critical tools in the war on terror. It is vital that our government gather intelligence to protect the American people from terrorist attacks, including critical information that may be obtained from those terrorists we have captured. At the same time, the Administration is committed to treating all detainees held by the United States in a manner consistent with our Constitution, laws, and treaty obligations, which reflect the values we hold dear. U.S. law and policy already prohibit torture. Our policy has also been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute for practices abroad. It also requires that the Defense Department's treatment of detainees be codified in the U.S. Army Field Manual.

These provisions reaffirm the values we share as a Nation and our commitment to the rule of law. As the sponsors of this legislation have stated, however, they do not create or authorize any right for terrorists to sue anyone, including our men and women on the front lines in the war on terror. These men and women deserve our respect and thanks for doing a difficult job in the interest of our country, not a rash of lawsuits brought by our enemies in our own courts. Far from authorizing such suits, this law provides additional liability protection for those engaged in properly authorized detention or interrogation of terrorists. I am pleased that the law also makes provision for providing legal counsel to and compensating our service members and other U.S. Government personnel for legal expenses in the event a terrorist attempts to sue them, in our courts or in foreign courts. I also appreciate the legislation's

elimination of the hundreds of claims brought by terrorists at Guantanamo Bay, Cuba, that challenge many different aspects of their detention and that are now pending in our courts.

\* \* \* \*

#### **4. Status of the Multinational Force in Iraq**

On November 11, 2005, the UN Security Council adopted Resolution 1637 on Iraq. S/RES/1637 (2005). Acting under Chapter VII of the UN Charter, the Security Council noted “that the presence of the multinational force in Iraq is at the request of the Government of Iraq” and reaffirmed “the authorization for the multinational force as set forth in resolution 1546 (2004).” The Security Council further decided “to extend the mandate of the multinational force as set forth in that resolution until 31 December 2006 . . . [and] that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or no later than 15 June 2006,” and declared “that it will terminate this mandate earlier if requested by the Government of Iraq. . . .” Annexed to Resolution 1637 are letters from Prime Minister Ibrahim Aleshaiker Al-Jaafari of Iraq (dated October 27, 2005) and from U.S. Secretary of State Condoleezza Rice (dated October 29, 2005) to the President of the Security Council.

In his letter, Prime Minister Al-Jaafari requested the extension of the mandate of the Multinational Force (“MNF”) stating:

. . . Until such time as the Iraqi security forces assume full responsibility for Iraq’s security, we need the continued support of the international community, including the participation of the Multinational Force, in order to establish lasting peace and security in Iraq. We understand that the Multinational Force is willing to continue its efforts. We therefore request the Security Council to extend, for a period of 12 months starting 31 December 2005, the mandate of the Multinational Force, as provided in Council resolution 1546 (2004), including the tasks and arrangements specified in the letters annexed thereto, with the

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proviso that the Council shall review that mandate upon being so requested by the Government of Iraq or at the end of a period of eight months from the date of the resolution and declare, in the extension, that it will terminate the mandate before the expiry of that period should the Government of Iraq so request.

Secretary of State Rice's letter confirmed the willingness of the MNF to continue to fulfill its mandate through the requested period, as excerpted below.

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Having reviewed the request of the Government of Iraq to extend the mandate of the Multinational Force (MNF) in Iraq (S/2005/687) and following consultations with the Government of Iraq, I am writing to confirm, consistent with this request, that the MNF under unified command stands ready to continue to fulfil its mandate as set out in Security Council resolution 1546 (2004).

Since the end of the occupation on 28 June 2004, the Government of Iraq and the MNF have developed an effective and cooperative security partnership to address the evolving nature of Iraq's security environment, including the continuing need to prevent and deter acts of terrorism. This partnership plays a critical role in the daily efforts to improve security throughout Iraq. In the context of this partnership, the MNF is prepared to continue to undertake a broad range of tasks to contribute to the maintenance of security and stability and to ensure force protection, acting under the authorities set forth in resolution 1546 (2004), including the tasks and arrangements set out in the letters annexed thereto, and in close cooperation with the Government of Iraq. The forces that make up the MNF will remain committed to acting consistently with their obligations under international law, including the law of armed conflict.

Substantial progress has already been made in helping to build and train the Iraqi Security Forces (ISF), allowing them to take on increasing security responsibilities. The Government of Iraq and the MNF are developing a security plan to set forth the conditions necessary for transfer of security responsibility from the MNF to the ISF. Conditions permitting, we look forward to notable prog-



ress in the next year. Together, we will build towards the day when the Iraqi forces assume full responsibility for the maintenance of security and stability in Iraq.

\* \* \* \*

## **5. Convention on Conventional Weapons**

On August 2, 2005, Edward Cummings, Head of the U.S. Delegation to the Eleventh Session of the Group of Governmental Experts for the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects ("Convention on Conventional Weapons" or "CCW"), delivered an opening statement concerning a possible Protocol on Prohibitions or Restrictions on the Use and Transfer of Mines Other than Anti-Personnel Mines ("MOTAPM"). The statement is excerpted below and available in full at <http://geneva.usmission.gov/ccw/Aug05Cummings.htm>.

\* \* \* \*

The U.S. Government is of the view that the 30 nation proposal\* represents the best approach to a MOTAPM protocol. We also note that, based on statements from delegations this morning and afternoon, as well as bilateral contacts that we have had, it is already possible to identify an emerging consensus on three fundamental principles that should produce a favorable result this year on a MOTAPM protocol. Those three principles are quite simple and direct. First, that all MOTAPM should be detectable for the purposes of humanitarian demining. Second, that some types of MOTAPM should have limited active life. Third, that transfer of MOTAPM should be restricted. For example, the Chinese package approach

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\* Editor's note: the proposal refers to a draft MOTAPM Protocol developed and co-sponsored by Albania, Australia, Belgium, Bulgaria, Cambodia, Canada, Croatia, Denmark, Estonia, Finland, Germany, Greece, Guatemala, Hungary, Japan, Latvia, Lithuania, Luxembourg, Malta, F.Y.R. Macedonia, Norway, Poland, Romania, Slovakia, Slovenia, South Korea, Spain, Switzerland, United Kingdom, and the United States of America.

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acknowledges the importance of detectability for demining purposes, as did the Russian statement earlier this morning. The Pakistani statement notes the need for advanced mine detection equipment as a way to address humanitarian demining concerns. Our view is clear. Detectability is crucial in any MOTAPM protocol, and mine detection devices are not effective until the mines can be detected.

We should recognize that there is more agreement on basic principles relating to the use of MOTAPM. Without minimizing the work that still needs to be done, the task before us now is to discuss how to implement these principles in a satisfactory and credible manner, taking into account the views of all delegations.

\* \* \* \*

We are confident that it is possible to come to basic agreement on the remaining issues during this session and be able to have a draft text to adopt at the November session for a new instrument on MOTAPM.

### **6. Protocol Additional to the 1949 Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem**

On December 8, 2005, the States Parties to the 1949 Geneva Conventions adopted the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem ("Protocol III"). The protocol "recognizes an additional distinctive emblem in addition to, and for the same purposes as, the distinctive emblems of the Geneva Conventions," including the red cross and red crescent. The new emblem, given the designation "red crystal" in the final act of the diplomatic conference at which Protocol III was adopted, is described in article 2(2) as "composed of a red frame in the shape of a square on edge on a white ground." The text of Protocol III is available at [www.icrc.org/Web/eng/siteengon.ssf/htmlall/treaties-third%20protocol-emblem-o81205/\\$File/PAIII\\_English\\_o8.12.2005\\_CLEAR19.12.pdf](http://www.icrc.org/Web/eng/siteengon.ssf/htmlall/treaties-third%20protocol-emblem-o81205/$File/PAIII_English_o8.12.2005_CLEAR19.12.pdf).

On December 5, 2005, U.S. State Department Legal Adviser John Bellinger, III, speaking at the diplomatic conference

on the adoption of Protocol III, welcomed the completion of the protocol, stating:

the distinctive emblems are critically important to identifying and offering safety to medical and religious personnel in the fog of the battlefield and the aftermath of a natural disaster. Over time, the Red Cross and Red Crescent have become symbols of humanity's compassion, recognized worldwide by those in need. Now, the time has come to make the emblems available to all by creating a new distinctive emblem. . . . We are pleased to support the draft Additional Protocol and urge all governments to support the adoption of this text."

Mr. Bellinger's comments are available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

A December 8, 2005, statement released by U.S. Department of State Deputy Spokesman Adam Ereli also welcomed the development, stating:

. . . This is an important, historic development. The Protocol paves the way for Magen David Adom, Israel's national society, to take up full membership in the International Red Cross and Red Crescent Movement. It is an important step toward the Movement's goal of being truly universal.

The United States thanks the Swiss Government for its intensive diplomatic efforts to address this long-standing humanitarian issue. We also congratulate in particular the Palestine Red Crescent Society and Magen David Adom for concluding a Memorandum of Understanding and an operational agreement in advance of the conference, achievements which facilitated the adoption of the Third Protocol.

The full text of Mr. Ereli's statement is available at [www.state.gov/r/pa/prs/ps/2005/57821.htm](http://www.state.gov/r/pa/prs/ps/2005/57821.htm).

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### 7. Amendments to the International Traffic in Arms Regulations and Export Administration Regulations

On August 29, 2005, the Department of State issued a final rule amending the International Traffic in Arms Regulations ("ITAR") with regard to ITAR's treatment of North Atlantic Treaty Organization ("NATO") member countries and major non-NATO allies. *See* 70 Fed. Reg. 50,958 (Aug. 29, 2005). Specifically, 22 C.F.R. § 120.31 (2005) was amended to add include new member countries comprising NATO, listing "Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, [t]he Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the United States." Moreover, 22 C.F.R. § 120.32 (2005) was amended to further define "Major non-NATO ally" as

a country that is designated in accordance with § 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321k) as a major non-NATO ally for purposes of the Foreign Assistance Act of 1961 and the Arms Export Control Act (22 U.S.C. 2751 et seq.) (22 U.S.C. 2403(q)). The following countries have been designated as major non-NATO allies: Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Thailand, and Republic of Korea. Taiwan shall be treated as though it were designated a major non-NATO ally (as defined in section 644(q) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(q))).

On November 7, 2005, the Department of Commerce, Bureau of Industry and Security issued a final rule amending the Export Administration Regulations to remove certain regional stability and crime control license requirements as to new NATO member countries, including Bulgaria, Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, so as to provide treatment consistent with all other NATO member states with respect to national security license requirements. 70 Fed. Reg. 67,346 (Nov. 7, 2005).

## **B. ARMS CONTROL AND DISARMAMENT**

### **1. The Strategic Arms Reduction Treaty**

#### ***a. Russian submarine-launched ballistic missile***

In June and October/November, 2005 the Twenty-seventh Session of the Strategic Arms Reduction Treaty (“START” or “Treaty”), (S. Treaty Doc. No. 102-20 (1991)), Joint Compliance and Inspection Commission\* (“JCIC-XXVII”) met in Geneva. The JCIC was established by Article XV of START as the forum in which Parties would resolve questions relating to compliance with the treaty and to agree on any additional measures that might be necessary to improve the effectiveness of the treaty.

The primary goal for this session was to address issues surrounding the new Russian submarine-launched ballistic missile (“SLBM”), the RSM-56—which is the first new type of ICBM or SLBM to be introduced by any party since entry into force of the START. A complicating factor was that this new SLBM is in a launch canister, which was not provided for in the START. Intercontinental ballistic missiles (“ICBMs”) in launch canisters, and ICBMs and SLBMs maintained, stored, and transported as assembled missiles without launch canisters, were covered. The negotiating history revealed that the parties discussed the possibility of SLBMs in launch canisters; however, since neither Party had such a missile at the time of treaty signature, the Parties decided to defer discussion of the issue to the JCIC.

Article XV of the START provides that the parties may “agree upon such additional measures as may be necessary

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\* Editor’s note: Because the START was originally concluded between the United States of America and the Union of Soviet Socialist Republics in 1991, following dissolution of the USSR, arrangements were made pursuant to the Lisbon Protocol to enable four successor states to become parties to START (the Russian Federation, the Republic of Kazakhstan, the Republic of Belarus, and Ukraine). See *Digest 1991-1999* at 2210-11. These four states, along with the United States, are represented in the Joint Compliance and Inspection Commission.

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to improve the viability and effectiveness of [the] Treaty.” This allows the parties to agree on administrative or technical changes (often called “V & E changes”) that would not affect the substantive rights and obligations of the parties. Such documents, in the START regime, have taken two forms: JCIC Agreements, in which a provision of one of the treaty’s protocols (or, possibly, another of the treaty documents, such as the treaty’s Memorandum of Understanding) is amended; or JCIC Joint Statements, in which the Parties come to a legally-binding “understanding” as to how a specific provision of the treaty or of a protocol should be interpreted.

The first order of business for the JCIC-XXVII was, in effect, to “bring the RSM-56 SLBM into the Treaty.” The parties did so by means of Joint Statement 37 in which they agreed that SLBMs in launch canisters will be covered by the same Treaty provisions as ICBMs in launch canisters, unless otherwise agreed in the JCIC, as set forth below.

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With respect to . . . the Treaty, the Parties understand that for SLBMs that are maintained, stored, and transported as assembled missiles in launch canisters, including the SLBM designated by the Russian Federation as the RSM-56, an assembled missile of a particular type, in its launch canister, shall be considered to be an SLBM of that type.

The Parties understand that the Treaty definition of “launch canister” shall also mean a container, directly associated with an SLBM, that can be or has been used for transporting and storing an assembled SLBM, with or without its front section, and from which an SLBM can be or has been launched.

The Parties agree that the provisions of the Treaty that apply to ICBMs that are maintained, stored, and transported as assembled missiles in launch canisters, or their launch canisters, shall also apply to SLBMs that are maintained, stored, and transported as assembled missiles in launch canisters, or their launch canisters, including the SLBM designated by the Russian Federation as the RSM-56, unless otherwise agreed. The Parties shall, within the framework of the Joint Compliance and Inspection Commission, discuss and agree on, as appropriate, any exceptions to or modifi-

cations of the specific provisions of the Treaty that will apply for such SLBMs or their launch canisters.

The parties also determined that it was necessary to provide for certain declared differences between these missiles and the training models of missiles ("TMOMs") for the RSM-56, that could be encountered by U.S. inspectors, and for the provision of photographs of such differences to assist inspectors. This was the subject of JCIC Joint Statement 38 (modeled after JCIC Joint Statement 8, dated April 14, 1993, which provided for all TMOMs in existence at that time). Excerpts follow; the full text of Joint Statement 38 is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

The Parties, referring to the Treaty . . . , understand that training models of the SLBM designated by the Russian Federation as the RSM-56 differ from SLBMs of that type on the basis of the following declared external and functional differences that are visible during inspections conducted pursuant to the Treaty:

\* \* \* \*

To assist inspectors, the Russian Federation shall either provide a photograph of each of the differences of training models of missiles for the RSM-56 or, if a photograph of any of such differences has not been provided prior to the first inspection of an item declared to be a training model of such a missile on the basis of such a difference, the inspected Party shall provide to the inspecting Party, during that inspection, a photograph of the difference, taken in accordance with paragraph 18 of Section VI of, and Subsection B of Section VI of Annex 8 to, the Protocol on Inspections and Continuous Monitoring Activities Relating to the Treaty.

The parties also addressed how the Russian Federation would make data declarations concerning its new missile. The START Memorandum of Understanding ("MOU"), which contains the parties' declarations, had no category for SLBMs in launch canisters; therefore, the parties decided to make a V & E change to the MOU to provide for this new category, in the form of JCIC Agreement Number 52. Finally (for the

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RSM-56), the parties modified one provision of the Inspection Protocol since it only provided for the possibility of inspectors encountering Intercontinental Ballistic Missiles ("ICBMs") in launch canisters. This required another V & E change, which took the form of JCIC Agreement Number 53. The texts of these two agreements are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

### ***b. Other agreements signed or initialed in JCIC-XXVII***

The Parties signed one other JCIC Agreement and initialed two other JCIC Joint Statements during JCIC-XVII. JCIC Agreement Number 54 was a change to Annex 8 to the Inspection Protocol necessitated by changes in Russian inspection equipment, available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). JCIC Joint Statement Number 39 dealt with the situation that U.S. inspectors might encounter if they saw a Russian SS-25 ICBM during an elimination inspection that had undergone a burn procedure to remove its fuel and been damaged to such an extent that its length no longer matched the length declared in the MOU. The full text of Joint Statement Number 39, excerpted below, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

The Parties, referring to . . . the Treaty, understand that, during data update inspections or conversion or elimination inspections, first stages of SS-25 ICBMs that have had their end domes burned out as a result of having had fuel removed by burning the stages without their nozzles attached, may be located at conversion or elimination facilities of ICBMs.

The Parties understand that the photographs of the first stage of an SS-25 ICBM, burned without nozzle attached, and declared data on the length of such a first stage, which were provided to the other Parties by the Russian Federation at JCIC-XXVII, may be used by the inspecting Party during data update inspections or conversion or elimination inspections only for the purpose of confirming this type of ICBM at conversion or elimination facilities of ICBMs.

\* \* \* \*



The Parties understand that no later than five days after entry into force of this Joint Statement, the Russian Federation will provide texts of footnotes specifying the length declared for the first stage of an SS-25 ICBM, burned without nozzle attached, in a notification provided in accordance with paragraph 3 of Section I of the Protocol on Notifications Relating to the Treaty. . . .

The Parties agree that the inspecting Party shall have the right during data update inspections or conversion or elimination inspections to confirm the type of ICBM by external viewing and by measurement of the dimensions of a first stage of an SS-25 ICBM, burned without nozzle attached.

Finally, the Russians needed to change the site diagram, as explained in the excerpt below, for one of their inspectable facilities. Pursuant to Annex J to the MOU, the Parties must agree to certain of those changes; they do so by means of an "S-Series" JCIC Joint Statement. JCIC Joint Statement Number S-21 was the result. The unclassified portion of the statement, excerpted below, is available in full at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

The Parties, referring to paragraph 19 of Annex J to the Memorandum of Understanding on the Establishment of the Data Base Relating to . . . the Treaty, taking into account the information with respect to the Zlatoust facility subject to suspect-site inspections, hereinafter referred to as the Zlatoust facility, provided in Annex A to this Joint Statement, agree on the following:

- (1) The new boundary of the Zlatoust facility shall be the boundary shown on the site diagram of the Zlatoust facility dated September 1, 2004, which is attached as Annex B to this Joint Statement.
- (2) The site diagram of the Zlatoust facility dated January 1, 1995, shall be used only for the inspection provided for in paragraph 3 of this Joint Statement.
- (3) The portions of the Zlatoust facility to be excluded, pursuant to this Joint Statement, from within the boundary shown on the site diagram of the Zlatoust facility dated January 1, 1995, shall be subject to inspection using the procedures of Section VIII of

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the Protocol on Inspections and Continuous Monitoring Activities Relating to the Treaty during the first inspection conducted at the Zlatoust facility in accordance with paragraph 5 of Article XI of the Treaty after the date the change to the boundary becomes effective. Thereafter, the portions of the Zlatoust facility to be excluded pursuant to this Joint Statement shall not be subject to inspection unless such portions are included within the boundary of any inspection site.

(4) The changes to the boundary of the Zlatoust facility shall become effective on the date specified in the notification provided by the Russian Federation in accordance with paragraph 19 of Section I of the Protocol on Notifications Relating to the Treaty, or on the date such notification is provided by the Russian Federation, or on the date of entry into force of this Joint Statement, whichever is latest.

\* \* \* \*

### *c. Other statements*

The Parties issued coordinated statements of policy on November 9, 2005, at the closing plenary meeting of JCIC-XXVII, resolving a longstanding Russian complaint concerning its stated inability, during reentry vehicle inspections in the United States, to confirm that the U.S. Trident II SLBM contains no more warheads than the number attributed to it under the START Treaty (eight). The unclassified attachment to the U.S. statement follows.

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The United States of America reaffirms that the front sections of Trident II SLBMs belonging to the United States of America are equipped with no more than eight reentry vehicles and that the United States of America will not equip them with more than eight reentry vehicles during the term of the START Treaty.

The United States of America notes that in order to resolve concerns regarding confirmation that the Trident II SLBM is not deployed with more reentry vehicles than its attributed number of warheads, the United States of America conducted a demonstration

in connection with reentry vehicle inspections of Trident II missiles at the submarine base, strategic weapons facility Atlantic, Kings Bay, Georgia, on February 7-9, 2005 (hereinafter, the demonstration).

The United States of America will supplement existing procedures for conducting Trident II reentry vehicle inspections with procedures for using the measuring device demonstrated. These procedures are designed to confirm that the cover used during Trident II reentry vehicle inspections is installed on the front section of the missile contained in the SLBM launcher in the same manner as was observed during the demonstration:

1. After all of the inspectors complete their 15 minutes of viewing of the installed cover used during Trident II reentry vehicle inspections, the inspection team leader, at the request of the escort team leader, designates from among the inspection team members two measurement groups consisting of two inspectors each. When requested by the in-country escort, each group in turn moves to the temporary structure specially intended for preparing the front section for the viewing of the SLBM launcher, where it is given the opportunity to examine the measuring device used during Trident II reentry vehicle inspections. Each group in turn observes as facility personnel take one measurement per group to determine the distance from the upper point of the hard cover to the upper point of the SLBM third stage motor, as was done during the demonstration.
2. If each of the two measurements differs by no more than three centimeters from the benchmark measurement, the two measurements are averaged to determine the distance from the upper point of the hard cover to the upper point of the SLBM third stage motor. In this regard, as stated by the United States of America during the demonstration, the benchmark measurement for a Trident II type A SLBM configuration is 23 centimeters, and the benchmark measurement for a Trident II type B SLBM configuration is 24 centimeters.
3. The measurements taken and the average obtained for the distance from the upper point of the hard cover to the upper point of the SLBM third stage motor are recorded in the inspection report.

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Provided that the average value for the distance from the upper point of the hard cover to the upper point of the SLBM third stage motor, obtained on the basis of the measurements taken using the aforementioned device, does not differ from the benchmark measurement by more than three centimeters, the inspecting party will:

1. Insert an asterisk (“\*”) as a note instead of a number in section II of the inspection report, in the column “confirmed by inspecting party” and indicate on that page that the asterisk refers to the relevant note in section IV of the inspection report.
2. Include the following as a note in section IV of the inspection report:

“In addition to the reentry vehicle inspection procedures, the inspected party used the measuring device demonstrated earlier during the demonstration on February 7-9, 2005, at the Kings Bay submarine base, Georgia. The measurement results specified in this report show that the cover used during the inspection was installed on the missile front section in the same manner as was observed during the demonstration.

“Thus, it has been indirectly confirmed, with the assistance of the measuring device demonstrated during the February 7-9, 2005, demonstration, that the front section of the inspected SLBM contains no more than eight reentry vehicles.”

Finally, three of the parties—the United States, Russian Federation, and Belarus—made a technical amendment to a set of letters exchanged in 2002 to provide for the United States to use resupply trucks instead of aircraft to resupply its monitors at the Votkinsk facility. (The text of the 2002 letters is available at [www.defenselink.mil/acq/acic/treaties/start1/other/corresp/votkinsk\\_transport.htm](http://www.defenselink.mil/acq/acic/treaties/start1/other/corresp/votkinsk_transport.htm)) Belarus exchanged the same letters because the resupply trucks pass through its territory.

**d. Other START issues**

Each year the U.S. Department of State, Bureau of Verification, Compliance and Implementation (“VCI”) publishes its report on Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (often referred to as the “Noncompliance Report”), in both classified and unclassified forms. *See* subsection a(4) of 22 U.S.C. § 2593a. Several years ago, at the request of the Congressional staffers who receive the reports, the VCI Bureau decided to include more information in the unclassified version of the report. Before the United States could release any START compliance concerns against other parties in an unclassified form, it was required to comply with paragraph 6 of Article VIII of the START, which provides that “[t]he Parties shall hold consultations on releasing to the public data and other information provided pursuant to [Article VIII] or received otherwise in fulfilling the obligations provided for in this Treaty.”

In 2003 the United States conducted the required consultations with the Russian Government regarding a number of longstanding, unresolved U.S. concerns about Russian compliance with the START Treaty—some of which date back to the first year of START implementation. These included Russia’s preventing U.S. inspectors from measuring the launch canisters of certain ICBMs or verifying that certain ICBMs do not contain more warheads than attributed under the Treaty. The U.S. concerns also included Russia’s failure to provide all required telemetry materials for some START-accountable flight tests, failing properly to declare certain ICBM road-mobile launchers accountable under the Treaty, and locating some deployed SS-25 ICBM launchers outside their declared restricted areas. With respect to this last issue, however, it should be noted that Russia has taken steps that have resolved U.S. compliance concerns. The full unclassified START section of the August 2005 edition of the Noncompliance Report can be found at [www.state.gov/t/vci/rls/rpt/51977.htm#chapter5](http://www.state.gov/t/vci/rls/rpt/51977.htm#chapter5).

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### 2. The Moscow Treaty

The Moscow Treaty on Strategic Offensive Reductions, which entered into force on June 1, 2003, provided that both parties (the Russian Federation and the United States of America) would reduce their strategic nuclear warheads so that by December 31, 2012, the aggregate number of such warheads will not exceed 1,700-2,200 for each Party. *See Digest 2002* at 1017-23 and *Digest 2003* at 1068. The treaty established the Bilateral Implementation Commission ("BIC") for the Parties to meet for the purposes of implementing the treaty. The treaty provides that the BIC would meet "at least twice a year" (Article III).

In 2005 the United States and the Russian Federation held two meetings of the BIC in Geneva. During each meeting, the parties exchanged briefings on the status of and plans for their strategic nuclear forces. No documents were completed at either session of the BIC.

### 3. Biological Weapons Convention

#### a. *Joint statement: United States, United Kingdom and Russian Federation*

On March 26, 2005, the United States, the United Kingdom, and the Russian Federation issued a joint statement in support of the Biological Weapons Convention ("BWC") on the 30<sup>th</sup> anniversary of the treaty's coming into force. The statement is provided in full below.

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The Biological and Toxin Weapons Convention (BWC) came into force 30 years ago today on 26 March 1975. The Convention was the first to ban an entire class of weapons of mass destruction and is one of the first and crucial components in the non-proliferation toolbox. It remains as relevant today as it was when it was first drafted, although the threats we face have evolved. The international response to those new threats builds on the strong foundation of the existing multilateral disarmament framework of which the BWC is a part.

Therefore, as the Depositary Governments of Biological and Toxin Weapons Convention we reaffirm our support for the Convention. We seek practical realization of all BWC obligations. Our Governments will continue to work to strengthen it by participating fully in the current three-year work program, by encouraging its universality, and by pressing for full implementation of, and compliance with, the Convention by all its States Parties. In particular, we stress the necessity of adoption by all States Parties of relevant penal legislation for violations of the BWC. The Sixth BWC Review Conference in 2006 will give all States Parties an opportunity to review steps taken to meet the BW threat since the last Review Conference and to renew their commitment to the Convention, their compliance and its full implementation and to strengthen further the Convention.

We call on all States not Party to the BWC to join promptly and thereby strengthen the global effort to counter proliferation.

***b. Codes of conduct for scientists***

From June 13-24, 2005, the Biological Weapons Convention Experts Meeting convened in Geneva, Switzerland, to discuss the professional responsibility of scientists with the goal of promoting efforts of scientists to draft “Codes of Conduct for Scientists” in order to address concerns about the potential misuse of biotechnology as well as preserving the free flow of scientific information. *See* statement of Ambassador Donald Mahley, Deputy Assistant Secretary for Arms Control Implementation and the head of the U.S. delegation, June 13, 2005, available at [www.state.gov/t/ac/rls/rm/48454.htm](http://www.state.gov/t/ac/rls/rm/48454.htm).

On December 5, 2005 Ambassador Mahley delivered an opening statement at the Biological Weapons Convention Annual Meeting of States Parties that discussed progress toward developing such codes of conduct. The full text of Ambassador Mahley’s statement, excerpted below, is available at [www.state.gov/t/ac/rls/rm/58069.htm](http://www.state.gov/t/ac/rls/rm/58069.htm).

... [W]e look forward to working with you this week as we review lessons gained on “Scientific and Professional Responsibility ...

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and the content, promulgation, and adoption of codes of conduct for scientists.” As in earlier years of the Work Program, we are pleased that States Parties are actively engaging in the substance of the issue. Unique to this topic is the emphasis on the need for scientific organizations to develop their own, appropriate, codes of conduct. Despite the organizational challenge of having professional groups brief the BWC States Parties, the purpose of the Meeting was well fulfilled. Expert discussions and exchanges that took place before, during and following the meeting have helped generate a greater understanding of emerging codes of conduct, their role in reinforcing, and in some ways personalizing, the norm against biological and toxin weapons, and provide an impetus to efforts promoting scientists’ professional responsibilities.

We believe that Codes can become an increasingly important tool in the fight against bioweapons proliferators and the biothreat overall. Concerns about the misuse of biotechnology and a desire to preserve the free flow of scientific information have spurred discussion about the professional responsibility of the scientific community and the proper role of national governments in promoting standards. In the past few months, a number of scientific and professional organizations, as well as NGOs and IGOs, have proposed guidelines for general and targeted codes. A universal code, we believe, is neither practical nor necessarily desirable. Generic principles of codes of conduct, in our opinion, are the best recommendations for consideration by BWC States Parties.

Last Thursday, December 1, the “InterAcademy Panel,” (IAP), the umbrella organization for the National Academies of Science worldwide, released basic principles relating to the construct of Codes. These principles have been formally endorsed by 69 of the 92 IAP members. With the caveat that the principles are not a comprehensive list, the IAP presents “fundamental issues that should be taken into account when formulating codes of conduct.” To summarize, the basic themes are; 1) awareness by scientists of the possible consequences of their research and the need to refuse any research that has only harmful outcomes, 2) safety and security, wherein scientists working with dangerous pathogens have the responsibility to ensure good pathogen security and biosecurity practices “whether codified by law or common practice, ” 3) increased



distribution of educational information on both the potential for misuse of dual-use materials and the laws and regulations aimed at preventing misuse, 4) accountability of scientists to notify appropriate authorities should a violation of the BWC or other related legislation, regulations an[d] guidelines occur, and finally 5) the responsibility of scientists with oversight functions to instill these principles in others. The full text of these basic principles can be found on the IAP website—[www.interacademies.net/iap](http://www.interacademies.net/iap).

This enhanced recognition by scientists and others, and by States Parties to the BWC of scientists' professional responsibilities toward ethical and responsible behavior, complements States Parties' national compliance objectives and contributes to our overall international security.

\* \* \* \*

#### **4. Chemical Weapons**

##### ***a. Compliance with Chemical Weapons Convention***

During 2005 Ambassador Eric M. Javits, head of the United States Delegation to the Executive Council Sessions of the Organization for the Prohibition of Chemical Weapons ("OPCW"), addressed the Executive Council's fortieth, forty-first and forty-second sessions, held at The Hague, the Netherlands. Ambassador Javits focused on a U.S. policy priority relating to Article VII of the Chemical Weapons Convention ("CWC"). Article VII provides, *inter alia*, that States shall "adopt the necessary measures to implement [their] obligations" under the convention, including by undertaking certain legislative and administrative measures and designating a National Authority. Excerpts from Ambassador Javits' remarks at two of these sessions are provided below; the full texts of each speech, as well as others, are available at [www.state.gov/t/isn/cwc/c6347.htm](http://www.state.gov/t/isn/cwc/c6347.htm).

Excerpts follow from Ambassador Javits' March 15, 2005 statement at the Council's fortieth session.

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\* \* \* \*

The most urgent task facing this organization and its member states is achieving full national implementation of Article VII of the Convention. . . .

\* \* \* \*

Ultimately, each member state is responsible for meeting all of its obligations under Article VII of the Convention. We have all undertaken treaty obligations, and we must all make every effort to honor them. However, it is also clearly in everyone's interest to assist member states in achieving full national implementation. States Parties needing help in meeting their Article VII obligations should request assistance from the Technical Secretariat or other States Parties—and do so in time for the necessary assistance to be provided prior to the Tenth Conference. Although we cannot and should not relieve a State Party of its responsibility, the Technical Secretariat and other States Parties can and should help.

The U.S. has undertaken a number of bilateral missions to assist specific countries in meeting their Article VII obligations, and more are being planned. In fact, the U.S. and the TS have a team working with Caribbean States Parties this week. Two weeks ago, a similar team worked with states in East Africa, assisting with the development of draft legislation, reviewing declaration requirements, and helping to develop national action plans to meet Article VII obligations. Experience shows that carefully prepared working sessions in capitals can be the most effective form of assistance. At this stage of the Article VII Action Plan, many more such bilateral visits are needed—and needed during the next few months. Every State Party has a variety of agencies and departments affected by Article VII obligations, and this approach allows for work with all the key interlocutors. Member states that fall short of full national implementation do so in a variety of ways, for any number of reasons. By sitting down with the various officials involved in a particular member state, we have been able to provide very specific, tailored advice and support, rather than repeating generalities about the importance of Article VII or a generic summary of the relevant treaty obligations.

In addition, in cooperation with Romania, we have updated our Implementation Assistance Program on the basis of State Party comments received to date. We would like to thank the Romanian government for establishing a website from which States Parties can download copies of the manual and software.

The U.S. has been encouraged by the numerous offers by member states to provide experts to assist in achieving national implementation. We urge those states that have not yet done so to identify specific individuals and areas of expertise as soon as possible to supplement the work of the Technical Secretariat. And we call on those who have not offered such support to consider whether they can make a similar contribution. Lastly, we urge the Technical Secretariat to focus its efforts on missions to individual States Parties, coordinating closely with the facilitator and interested member states to ensure that the right support is extended to the right countries. As we emphasized at the time of adopting the action plan, the achievement of full national implementation by all States Parties is of paramount importance to us all. The unanimous adoption of United Nations Security Council Resolution 1540 in April 2004 highlighted the importance of adoption and enforcement of effective legal and regulatory standards to prevent proliferation of chemical weapons. Full implementation of Article VII requirements in accordance with the provisions of the Action Plan is the key to meeting these objectives of Resolution 1540.

Mr. Chairman, we have a number of other important issues to address in the coming week. We heard yesterday an update from Libya and Albania on the status of their work on eliminating their chemical weapons stockpiles. The U.S. has strongly supported the efforts of both countries to destroy their stocks, and welcomes their ambitious plans. The examples of Libya and Albania highlight the importance of universal adherence to the Convention. In 2004, nine new States Parties joined the CWC. We hope and expect to build on that record of success in 2005. . . .

Yesterday, many delegations also heard the report from Mr. Thomas Cataldo of the Department of Defense on the status of U.S. destruction activities. . . . That presentation, I think, makes clear that we remain on track in meeting our next major destruction milestone, which is to have 45 percent of our stockpile destroyed by December

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31, 2007. As you all know, our final deadline has been extended “in principle.” The U.S. will present its final CW destruction deadline request in accordance with the provisions of the Convention. We remain firmly committed to prompt, safe, and environmentally responsible destruction of our chemical weapons stockpile under international monitoring.

\* \* \* \*

On September 27, 2005, Ambassador Javits addressed the Council for the third time in 2005 at the Council’s forty-second session. Excerpts follow.

\* \* \* \*

The recent extensive report prepared by the Technical Secretariat on the status of implementation efforts by all States Parties demonstrates that significant progress has been made in the last 2 years. We greatly appreciate that report, which will be invaluable in helping us assess what has been accomplished and what remains to be done. . . .

\* \* \* \*

The TS report, however, also makes clear that some member states have not even taken the most basic steps to fulfill their Article VII obligations. We cannot understand, for example, why 17 states that joined more than 2 years ago have failed to establish or designate a National Authority. We also cannot understand why 21 states that have yet to submit required information on their legislative and administrative measures have not drafted legislation and submitted it to their legislative bodies for approval.

\* \* \* \*

It is important to note that the States Parties agreed to this deadline 2 years ago. The Council should not now indicate that the States Parties really didn’t mean what they agreed to by entertaining discussions on re-extending the Article VII deadline, or by not taking any action to act on such matters of non-compliance. Such behavior undermines the credibility of the Council and the relevancy of the Convention itself. It is incumbent upon all of us to distinguish between those that have taken their obligations seriously

and worked hard, and those that have ignored their obligations by doing little or nothing.

At the 41<sup>st</sup> Executive Council meeting in June, the United States submitted a paper with proposals for measures to be adopted by the Conference to ensure that states meet their Article VII obligations. Our proposals are fair and measured. They recognize that many states have taken action, but need some additional time to adopt legislation. For that reason, our proposals incorporate a grace period and continued assistance, but also require more detailed reporting to the Council so that it may monitor what is being accomplished. At the same time, the proposals reflect our conviction that states that have not tried to fulfill their obligations under the Convention also do not have a legitimate claim to benefits outlined in the Convention.

\* \* \* \*

The United States believes that the establishment of the 20% deadline\*, by the Conference in 2003, had a positive effect on the forward progress of Russia's CW destruction program. Similarly, we believe that establishing a firm date for the 45% deadline will further energize CW destruction efforts in Russia. Setting a date provides donors with an internationally accepted benchmark that permits governments to facilitate planning for assistance to the Russian CW destruction program. As a result, Mr. Chairman, we look forward to discussing this important issue later.

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On April 11, 2005, Ambassador Mahley testified before the Subcommittee on Emerging Threats and Capabilities of the Senate Armed Services Committee. The full text of his

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\* Editor's note: The Conference of the States Parties to the Chemical Weapons Convention, at its eighth session (20-24 October 2003), considered and approved the decision to establish April 29, 2007, as the revised, intermediate deadline for the destruction of 20% of the chemical weapons declared by the Russian Federation. The Russian Federation was also granted an extension of the final date of destruction for 45% of its stockpiles, without establishing a specific deadline.

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statement before the Subcommittee, excerpted below, is available at [www.state.gov/t/ac/rls/rm/44633.htm](http://www.state.gov/t/ac/rls/rm/44633.htm).

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I am very pleased to have been invited here today to testify on the Chemical Weapons Convention (CWC) implications of the United States chemical weapons demilitarization program. . . I will try to be brief and to outline mostly what the Chemical Weapons Convention requires, as well as my view on the implications for the United States role under that Convention of the demilitarization activities you have had described today.

\* \* \* \*

Article IV of the Chemical Weapons Convention requires all parties to the Convention to destroy completely their chemical weapons stockpiles. Paragraph 6 of Article IV states that such destruction “. . . shall finish not later than 10 years after entry into force of this Convention.” Part IV (A) of the Verification Annex of the Convention provides additional details on the destruction of chemical weapons. Paragraph 13 of Part IV (A) specifies that “. . . the following processes may not be used: dumping in any body of water, land burial, or open-pit burning.” Paragraph 24 provides that if a country is not able to complete destruction of its chemical weapons within ten years of entry into force of the Convention, it may apply for extension of the deadline. However, “any extension shall be the minimum necessary, but in no case shall the deadline for a State Party to complete destruction of all chemical weapons be extended beyond 15 years after the entry into force of this Convention.”

What all of that language combines to mean is that the United States, in order to comply with its obligations under the Chemical Weapons Convention, must complete destruction of its chemical weapons inventory by April 29, 2012. That date assumes the maximum possible extension under the Convention. Obtaining the extension should be feasible, especially considering the number of briefings we have provided to other parties at the OPCW and the demonstration—through money and effort—of our intentions to carry out destruction as rapidly as feasible. However, obtaining extensions beyond that date is not an available option under the provisions of the Convention.

Having been involved in the negotiation of the Chemical Weapons Convention, let me make it clear that those deadlines were inserted into the text with the vigorous support of the United States. With the information then available to us and the program projections then being used, the deadlines offered what we judged as a very safe margin while not allowing other states to procrastinate indefinitely in their own destruction programs.

I have been asked specifically to address the implications for the United States with respect to the Chemical Weapons Convention if we do not complete one hundred per cent destruction of our chemical weapons inventory by April 29, 2012. The most obvious but most central point, should this occur, is that we will unequivocally become noncompliant with our obligations. There is no automatic procedural or substantive impact of such non-compliance on our participation in the CWC and the OPCW. That is, we do not automatically lose our vote in either the Executive Council or the Conference of State Parties, we are not barred from selection to the Executive Council, and we are not subject to any additional inspections. However, Article XII lists a range of measures that can be taken by the Conference in different stages of non-compliance. It provides that “where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfill the request within the specified time, the Conference may . . . restrict or suspend the State Party’s rights and privileges under [the] Convention until it undertakes the necessary action to conform with its obligations under [the] Convention.” It also provides that in cases where serious damage to the object and p[ur]pose of the Convention may result from activities prohibited under the Convention, the Conference “may recommend collective measures to States Parties in conformity with international law,” and “in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.”

Further, it does not appear that Article XII was intended to restrict the rights of Parties to the Chemical Weapons Convention to take the actions allowed under international law in response to a breach. As codified in the Vienna Convention on the Law of Treaties, a party specially affected by a material breach may “invoke it

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as a ground for suspending the operation of the treaty in whole or in part between itself and the defaulting State.” Other parties may do the same if the treaty is of such a character that a material breach of its provisions radically changes the position of every party with respect to the further performance of its obligations.

Given that the United States operates by rule of law and under the overall national policy objective of complying with its international legal obligations, it obviously is a highly undesirable circumstance if we were not to adhere to those obligations. There is also great difficulty in pressing other countries to comply with the Chemical Weapons Convention if the United States is non-compliant. The particular dilemma we face here, however, is that attempting to alter the CWC obligations in such a way as to avoid non-compliance is fraught with real risk.

We could attempt to amend the Convention. I would strongly recommend against any such effort for two reasons.

**First**, if we were successful, we would then be establishing the very situation we strenuously tried to avoid during the negotiation of the Convention: we would be making the destruction obligation essentially open-ended, and thus gravely undermine the incentive for other possessors to continue to make chemical weapons destruction a priority in their own national planning. For the record, based on the current situation, the only other possessor likely facing the situation of not being done with destruction by 2012 is Russia. Indeed, it would be a major challenge for Russia to have even half its declared stockpile destroyed by 2012.

**Second**, in opening the Convention to amendment, we run the real risk of other countries adding their own favorite subjects to the amendment effort. Any and all such proposals would need to be taken seriously, because the CWC amendment procedures in effect give each State Party a veto, and thus the ability to hold any amendment hostage to their own proposals. Seeking to amend the destruction deadline potentially could undermine the very object and purpose of the Convention, since there is a real desire on the part of a number of countries to convert the document from being an arms control and security agreement to being a technology transfer and chemical industry assistance agreement.



If current assumptions hold and we are non-compliant for not having completed our stockpile destruction, there inevitably will be some countries that will argue that the United States has lost its right to offer opinions on the activities of other countries—at least with respect to chemical weapons. Frankly, this argument is made today even before the deadline has been reached, on the basis that we have an inventory at all. Responsible countries will not credit such arguments. I do not believe that we will damage our international influence fatally, if we have not completed our destruction by the deadline, so long as we are continuing to devote obvious and extensive effort and resources to the program and so inform the other parties.

The Russian Federation could seize on any failure of the United States to complete destruction by 2012 as an excuse to further submerge its own destruction program in competing budget priorities, and to justify its own failure to meet the treaty deadline. In response, we would need to emphasize that our performance which far outstrips theirs in both effort expended and results achieved, should not distract anyone from examining Russia's performance on its own merits.

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***b. Chemical weapons destruction in Libya***

On September 28, 2005, President George W. Bush waived certain restrictions contained in the Arms Export Control Act prohibiting the transfer of defense articles and services to Libya. See Presidential Determination 2005-39, 70 Fed. Reg. 60,399 (Oct. 17, 2005), also available at [www.whitehouse.gov/news/releases/2005/09/20050928-3.html](http://www.whitehouse.gov/news/releases/2005/09/20050928-3.html). This waiver would allow the export from the United States, subject to export license requirements, of equipment related to the destruction of chemical weapons and precursor stockpiles to assist Libya to further effectuate its December 19, 2003, announcement that it would eliminate its weapons of mass destruction programs. See *generally Digest* 2003 at 1068-69.

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Pursuant to the authority vested in me by the Constitution and laws of the United States, including sections 40(g) and 40A of the Arms Export Control Act (AECA), I hereby:

- determine that the transaction, encompassing sales or licensing for export of defense articles or defense services necessary to assist in chemical weapon (CW) destruction in Libya, is essential to the national security interests of the United States and important to the national interests of the United States;
- waive the prohibitions in sections 40 and 40A of the AECA related to such transaction; and
- assign to you the functions under AECA section 40(g)(2) to consult with and submit reports to the Congress for proposed specific exports or transfers, 15 days prior to permitting them to proceed, that are necessary for and within the scope of this waiver determination and the transaction referred to herein.

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### 5. Man-Portable Air Defense Systems

On February 24, 2005, U.S. Secretary of State Condoleezza Rice and Russian Defense Minister Sergey Ivanov signed the United States-Russia Arrangement on Cooperation in Enhancing Control of Man-Portable Air Defense Systems ("MANPADS") in Bratislava, Slovakia. Although the agreement itself is not publicly available, a U.S. Department of State Fact Sheet, available at [www.state.gov/r/pa/prs/ps/2005/42647.htm](http://www.state.gov/r/pa/prs/ps/2005/42647.htm), described the bilateral arrangement as providing a framework for cooperation in the control of MANPADS. The fact sheet explained that MANPADS "can threaten global aviation if obtained by criminals, terrorists and other non-state actors. One goal of the Arrangement is to facilitate the destruction of MANPADS that are obsolete or otherwise in excess of legitimate defense requirements. This Arrangement also will allow the two countries to share information about MANPADS sales and transfers to third countries."

## C. NONPROLIFERATION

### 1. Country or Regional Issues

#### *a. Democratic People's Republic of Korea*

At the fourth round of Six-Party talks held in Beijing, China, in July, August, and September 2005, the Democratic People's Republic of Korea ("DPRK"), Japan, the People's Republic of China, the Republic of Korea, the Russian Federation, and the United States released a Joint Statement on September 19, 2005. For more information on the Six-Party talks, *see Digest 2004* at 1149-55. The Joint Statement reflected the effort by the participants to move forward on the goal of the denuclearization of the Korean Peninsula and the return of the DPRK to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and to International Atomic Energy Agency ("IAEA") safeguards. The Joint Statement, available at [www.state.gov/r/pa/prs/ps/2005/53490.htm](http://www.state.gov/r/pa/prs/ps/2005/53490.htm), is excerpted below.

\* \* \* \*

For the cause of peace and stability on the Korean Peninsula and in Northeast Asia at large, the Six Parties held, in the spirit of mutual respect and equality, serious and practical talks concerning the denuclearization of the Korean Peninsula on the basis of the common understanding of the previous three rounds of talks, and agreed, in this context, to the following:

1. The Six Parties unanimously reaffirmed that the goal of the Six-Party Talks is the verifiable denuclearization of the Korean Peninsula in a peaceful manner.

The DPRK committed to abandoning all nuclear weapons and existing nuclear programs and returning, at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons and to IAEA safeguards.

The United States affirmed that it has no nuclear weapons on the Korean Peninsula and has no intention to attack or invade the DPRK with nuclear or conventional weapons.

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The ROK reaffirmed its commitment not to receive or deploy nuclear weapons in accordance with the 1992 Joint Declaration of the Denuclearization of the Korean Peninsula, while affirming that there exist no nuclear weapons within its territory.

The 1992 Joint Declaration of the Denuclearization of the Korean Peninsula should be observed and implemented.

The DPRK stated that it has the right to peaceful uses of nuclear energy. The other parties expressed their respect and agreed to discuss, at an appropriate time, the subject of the provision of light water reactor to the DPRK.

2. The Six Parties undertook, in their relations, to abide by the purposes and principles of the Charter of the United Nations and recognized norms of international relations.

The DPRK and the United States undertook to respect each other's sovereignty, exist peacefully together, and take steps to normalize their relations subject to their respective bilateral policies.

The DPRK and Japan undertook to take steps to normalize their relations in accordance with the Pyongyang Declaration, on the basis of the settlement of unfortunate past and the outstanding issues of concern.

3. The Six Parties undertook to promote economic cooperation in the fields of energy, trade and investment, bilaterally and/or multilaterally.

China, Japan, ROK, Russia and the US stated their willingness to provide energy assistance to the DPRK.

The ROK reaffirmed its proposal of July 12th 2005 concerning the provision of 2 million kilowatts of electric power to the DPRK.

4. The Six Parties committed to joint efforts for lasting peace and stability in Northeast Asia.

The directly related parties will negotiate a permanent peace regime on the Korean Peninsula at an appropriate separate forum.

The Six Parties agreed to explore ways and means for promoting security cooperation in Northeast Asia.

5. The Six Parties agreed to take coordinated steps to implement the afore-mentioned consensus in a phased manner in

line with the principle of “commitment for commitment, action for action”.

6. The Six Parties agreed to hold the Fifth Round of the Six-Party Talks in Beijing in early November 2005 at a date to be determined through consultations.

On October 6, 2005, in testimony before the House International Relations Committee, Assistant Secretary of State for East Asian and Pacific Affairs Christopher R. Hill explained the elements of the Joint Statement, and next steps in the Six-Party talks. Excerpts from this testimony, available in full at [www.state.gov/p/eap/rls/rm/2005/54430.htm](http://www.state.gov/p/eap/rls/rm/2005/54430.htm), appear below. Mr. Hill’s closing statement in Beijing at the time of the Joint Statement, referred to in his testimony, is available at [www.state.gov/r/pa/prs/ps/2005/53499.htm](http://www.state.gov/r/pa/prs/ps/2005/53499.htm).

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For the first time, the D.P.R.K. committed to abandoning all nuclear weapons and existing nuclear programs and returning, at an early date, to the Treaty on the Nuclear Non-Proliferation of Nuclear Weapons and to IAEA safeguards. The new D.P.R.K. commitment is broader in scope than was the case under the Agreed Framework, under which the D.P.R.K. agreed to cease a series of defined nuclear activities at specific facilities. While North Korea did freeze its graphite-moderated reactor programs, it subsequently violated the Agreed Framework and the 1992 inter-Korean joint declaration on denuclearizing the Peninsula by pursuing a clandestine uranium enrichment program. Although the D.P.R.K.’s new pledge to dismantle is unambiguous, the proof of its intent will of course be in the nature of its declaration of nuclear weapons and programs, and then in the speed with which it abandons them. In my closing statement at the talks, Mr. Chairman, I specified that the D.P.R.K. must comprehensively declare, and then completely, verifiably and irreversibly eliminate, all elements of its past and present nuclear programs—plutonium and uranium—and all of its nuclear weapons, and not reconstitute those programs in the future. I made clear that to return to the NPT and come into full compliance with IAEA safeguards, the D.P.R.K. would, among other things, need to

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cooperate on all steps deemed necessary to verify the correctness and completeness of its declarations of nuclear materials and activities. My counterparts from all the other parties to the Six-Party Talks stipulated in their own closing remarks that the signal achievement of the fourth round was the D.P.R.K.'s commitment to undertake full denuclearization. All my counterparts stressed that it was incumbent on the D.P.R.K. to abandon its nuclear status, return to the NPT and abide by IAEA safeguards.

There has been much comment on the D.P.R.K.'s future right to a civilian nuclear program. The D.P.R.K., in the Joint Statement, asserted that it has the right to peaceful uses of nuclear energy. The other parties took note of this assertion and agreed to discuss, at an appropriate time, the subject of the provision of a light water reactor to the D.P.R.K.

We have been crystal clear with respect to when the "appropriate time" would be to discuss with the D.P.R.K. provision of a light water reactor. The U.S. will only support such a discussion:

- after the D.P.R.K. had promptly eliminated all nuclear weapons and all nuclear programs, and this had been verified to the satisfaction of all parties by credible international means, including the IAEA; and
- after the D.P.R.K. had come into full compliance with the NPT and IAEA safeguards, had demonstrated a sustained commitment to cooperation and transparency, and had ceased proliferating nuclear technology.

The Korean, Japanese, Russian and Chinese delegations made statements in this regard, each specifying that they would handle any energy cooperation with D.P.R.K. in strict accordance with rights and obligations under the NPT and IAEA safeguards. None of them expressed a willingness to provide the D.P.R.K. with a [light water reactor] LWR, understanding that the D.P.R.K.'s legitimate energy needs are best met through other means. The D.P.R.K. Foreign Ministry, in a September 20 press statement, said the D.P.R.K. would return to the NPT and IAEA safeguards only after it received a light water reactor from the United States. The September 20 assertion is inconsistent with the language in the Joint Statement and at odds with statements made by all of the other parties.

Subsequent D.P.R.K. comments appear to modify the September 20 demand, but do not provide the clarity that we need. I will note again that none of the other parties expressed a willingness to provide the D.P.R.K. with an LWR.

In my closing statement in Beijing, I noted that the NPT recognized that Treaty parties could pursue peaceful uses of nuclear energy in the context of compliance with Articles I and II of the Treaty. Foremost among the Treaty's obligations for all but the five nuclear-weapons states is the commitment not to possess or pursue nuclear weapons. The Treaty also calls for its parties to adhere to safeguards agreements with the IAEA. Thus, the D.P.R.K.'s statement concerning its "right" to peaceful uses of nuclear energy should be premised on the verifiable elimination of all nuclear weapons and existing nuclear programs as well as the nation's coming into full compliance with the NPT and IAEA safeguards.

I also noted in my statement that the United States supported a decision by the end of this year to terminate KEDO and its light-water reactor project. We believe that KEDO as an organization has served its purpose and that now we need new, more secure, arrangements to carry out denuclearization.

As the D.P.R.K. takes steps to denuclearize, the other parties have agreed to a number of corresponding measures. In the Joint Statement, the U.S. affirmed that we have no nuclear weapons on the territory of the R.O.K. and that we have no intention to attack or invade the D.P.R.K. with nuclear or conventional weapons. But we do continue to worry about the large conventional forces the D.P.R.K. maintains. Let me underscore that the U.S. remains committed to our alliance with the R.O.K., and has no plan to withdraw additional troops from the Peninsula.

The Joint Statement specifies in the context of denuclearization, the U.S. and the D.P.R.K. will take steps to normalize bilateral relations, subject to bilateral policies. In my statement, I made clear the United States desires to normalize relations subject to resolution of our longstanding concerns. By this I meant that as a necessary part of the process leading to normalization, we must discuss important issues including human rights, biological and chemical weapons, ballistic missile programs, proliferation of conventional weapons, terrorism and other illicit activities. I left no doubt that if

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the D.P.R.K. wished to return to the international community, it would have to commit to international standards across the board, and then prove its intentions.

In the Joint Statement, the U.S. and its partners agreed to identify means of addressing the D.P.R.K.'s energy needs. The R.O.K. reaffirmed its proposal of July 12, 2005 concerning the provision of 2 million kilowatts of electric power to the D.P.R.K. The proposal provides an expedited and non-nuclear solution to the D.P.R.K.'s urgent need for energy, opening the way for economic modernization and development. The United States is considering how it might participate in provision of energy assistance. We are also thinking about how we might assist with retraining the D.P.R.K.'s nuclear scientists and workers.

Throughout the talks we appreciated the close cooperation and steadfast support of our Japanese and R.O.K. allies. Our trilateral consultations allowed us to achieve progress. We were pleased to see that the GOJ and D.P.R.K. in the Joint Statement said that they would undertake to normalize their relations in accordance with the Pyongyang Declaration, on the basis of settlement of the unfortunate past and outstanding issues of concern. Japan's delegate, in his closing statement, made clear that those issues included missiles and abductions; the U.S. supports this position.

When implemented, the total package of the undertakings in the Joint Statement will advance the U.S. national interest by denuclearizing the Korean Peninsula. The package is aimed at eliciting North Korean actions that will enhance the integrity of the global non-proliferation regime. If implemented, it will provide new opportunities for growth and stability in East Asia, and a new and better future for the North Korean people.

### Next Steps

The parties agreed to hold the Fifth Round of Six-Party Talks in Beijing in early November. We are preparing for those meetings now. The next step will be to have discussions on key elements of the Joint Statement, especially regarding D.P.R.K. actions to declare and dismantle its nuclear weapons program, and actions that the international community will take to verify that dismantlement. We will also begin to consider economic cooperation, energy



assistance and a normalization process. We will be drawing up time-lines and sequencing of actions. Through diplomatic channels, we are in touch with the other parties.

As we implement key elements of the Joint Statement, we will continue to take steps to protect ourselves and our allies from North Korea's proliferation and illicit activities. We have recently strengthened the Proliferation Security Initiative, consulted with key partners on D.P.R.K. conventional arms sales, and taken action under Section 311 of the Patriot Act against a bank in Macau used by the North Koreans for money laundering.

***b. Iran***

During 2005 the issue of Iran's compliance with its NPT and safeguards obligations remained a topic of considerable international concern and debate at the IAEA. Following the IAEA Director General's September 2, 2005, report on the Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, GOV/2005/67, the IAEA Board of Governors adopted a Resolution on September 24, 2005, GOV/2005/77, which found that "Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement, as detailed in GOV/2003/75, constitute non compliance in the context of Article XII.C of the Agency's Statute" and found that Iran's nuclear activities "have given rise to questions that are within the competence of the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security". The Resolution further requested the Director General to report again to the Board on Iran's activities, and stated that the "Board will address the timing and content of the report required under Article XII.C and the notification required under Article III.B.4." The texts of both the September Director General's report and the Board's September 2005 resolution are available at [www.iaea.org/Publications/Documents/Board/2005/gov2005-67.pdf](http://www.iaea.org/Publications/Documents/Board/2005/gov2005-67.pdf) and [www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf](http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf), respectively.

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Following the resolution, the Director General submitted a follow-on report to the IAEA Board on November 18, 2005, GOC/2005/87, available at [www.iaea.org/Publications/Documents/Board/2005/gov2005-87.pdf](http://www.iaea.org/Publications/Documents/Board/2005/gov2005-87.pdf).

In November, 2005, U.S. Permanent Representative of the U.S. Mission to International Organizations in Vienna ("UNVIE"), Ambassador Gregory L. Schulte, delivered a statement on Iran to the Board that addressed both the September resolution and the Director General's November 18, 2005, report to the IAEA Board of Governors. Ambassador Schulte's statement, excerpted below, is available in full at [www.usun-vienna.rpo.at/\\_index.php?cmd=cmdFrontendSpeechesAndRelatedDocumentsDetail&speechid=143](http://www.usun-vienna.rpo.at/_index.php?cmd=cmdFrontendSpeechesAndRelatedDocumentsDetail&speechid=143)).

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Two months ago, the Board of Governors adopted a resolution that made two important findings. First, we found that Iran's many breaches and failures of its obligations to comply with its safeguards agreement constituted noncompliance as described in Article XII.C of the IAEA Statute. Second, we found that the long history of deception and concealment of Iran's nuclear activities, the nature of those activities, and the absence of confidence in Iran's peaceful nuclear intentions, have given rise to questions that are within the competence of the UN Security Council. Both of these findings are cause to report Iran to the UN Security Council. However, we chose instead to give Iran time to take positive steps that could then be reflected in the content of the requisite report. With that goal in mind, the September resolution urged Iran to take a number of steps, including:

- to provide the Agency with the extended transparency requested by Dr. ElBaradei in his September report, including access to individuals, documents relating to procurement, dual use equipment, certain military owned workshops, and research and development locations;
- to re-establish full and sustained suspension of all enrichment-related activity, including uranium conversion;

- to reconsider the construction of the heavy water reactor at Arak;
- to promptly ratify and implement an Additional Protocol;
- to continue acting as if the Protocol is in force pending its ratification; and finally,
- to observe fully its commitments and return to the negotiating process.

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On the basis of Dr. ElBaradei's November 18 report, one cannot avoid the conclusion that Iran has failed on each and every count to meet this Board's requests. Even on the fundamental issue of Iran's transparency and cooperation with inspections, Iran is continuing its long-held practice of choosing one or two areas for limited, selective, and incomplete cooperation, and then claiming the Agency's needs have been fully met. Moreover, the Director General's report underscores that the IAEA's concerns about Iran's past nuclear activities are growing instead of diminishing, and emphasizes that "Iran's full transparency is indispensable and overdue." For example:

The IAEA still seeks information, documentation, and access related to military workshops, the Physics Research Centre, the Lavisan-Shian site, and specific individuals associated with those efforts.

Documents described in the IAEA report—documents that Iran previously said did not exist regarding the 1987 offer of centrifuge technology by a proliferation network—raise new issues, including information Iran received on casting and machining hemispheres of enriched uranium, characteristic of weapons components and opening up a new field of safeguards enquiry.

The IAEA is still seeking information on the scope of Iran's P-1 and P-2 centrifuge programs, and continues to find implausible Iran's claims that it undertook no work on P-2 designs between 1995 and 2002.

Operation of the Esfahan uranium conversion facility is picking up, with the latest batch of yellowcake introduced into the facility on November 16, despite calls for re-suspension by the Board. The

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new batch of conversion is reportedly 50 percent larger than the previous batch.

Construction of the heavy water reactor at Arak continues, despite calls for reconsideration by the Board.

There has been no resolution of questions concerning uranium mining, Iran's past activities with polonium and beryllium, or the scope and history of Iran's plutonium separation experiments.

Rather than ratifying the Additional Protocol, Tehran has orchestrated through the Iranian Parliament a threat that appropriate and responsible Board action to address Iranian noncompliance, which is fully in accord with the IAEA Statute, will lead to even less Iranian cooperation with the IAEA.

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Given Iran's record of willfully disregarding the Board's requests, it would have been appropriate for this Board to adopt this week a resolution reporting Iran to the UN Security Council required under Articles XII.C and III.B.4. We believe a majority of Board members would support taking that step, even right now. But, just as we join with all in this room in seeking a diplomatic resolution, we likewise are willing to support the request of our EU-3 colleagues again to defer for a short period the required report to the Council. We do so in the sincere hope that Iran will reverse course and demonstrate it will meet its obligations and commitments before the report to the Security Council must be made.

Iran must understand that the report to the Council is required and will be made [at] a time of this Board's choosing. We again urge Iran to re-engage in good faith with the EU-3 on the basis of the Paris Agreement. For their part, it is clear the EU-3 are working hard to broaden the international consensus about how to address the crisis in confidence Iran has created. In that context, we welcome Russia's efforts to encourage Iran to return to negotiations, and the ideas that Russia has put on the table.

But the Board cannot and should not have unlimited patience if we seek to re-establish confidence about Iran's program, as well as demonstrate that states cannot simply ignore their IAEA and other nuclear nonproliferation obligations. Iran's pursuit of a nuclear weapons capability is a danger to all of us. The September resolution addressed the requirement for a report to the Security Council,

while still providing Iran some time to change course. Two months have passed since that resolution was adopted. The question for all of us is: How long can we give Iran to meet its obligations before we report to the Security Council? This question is before us at a time when the Director General continues to be unable to assure us that there are no more hidden elements to Iran's program, especially its centrifuge efforts. If so, how can we know that such covert efforts are not proceeding even now? The Director General has also now reported, despite previous Iranian denials, that Iran did indeed receive at least one document indicative of a weapons end-use.

The United States, and, we believe, a majority of Board members, are prepared to conclude that, absent a verified change of course in Iran, very little more time can pass before the Board must make its report to the UN Security Council. The Board will need to see Iran return to negotiations with the EU-3 on the basis of the Paris Agreement, and the Board will need to see that Iran is providing the full transparency that the IAEA has requested. We hope Iran will finally realize that the burden is squarely on it to do exactly what the Board has asked in hopes of rebuilding confidence. If Iran does not do so, this Board will have [n]o choice but to make a report to the Security Council that reflects the need for further action. Failure to do so would undermine the authority and credibility of the Agency and hinder its efforts to investigate Iran's nuclear program.

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**c. India**

On July 18, 2005, President George W. Bush and Indian Prime Minister Manmohan Singh issued a joint statement to describe what the two leaders saw as a transformed relationship, and to set out mutual commitments to foster and promote that relationship. Included in the statement was the President's offer to cooperate with India in the realm of civil nuclear energy, including to seek agreement from Congress to change U.S. laws and policies, as appropriate, and to work with international partners to make any appropriate adjustments to international regimes in order to enable full civil nu-

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clear cooperation and trade with India. The full text of the statement is provided below.

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Prime Minister Manmohan Singh and President Bush today declare their resolve to transform the relationship between their countries and establish a global partnership. As leaders of nations committed to the values of human freedom, democracy and rule of law, the new relationship between India and the United States will promote stability, democracy, prosperity and peace throughout the world. It will enhance our ability to work together to provide global leadership in areas of mutual concern and interest.

Building on their common values and interests, the two leaders resolve:

- To create an international environment conducive to promotion of democratic values, and to strengthen democratic practices in societies which wish to become more open and pluralistic.
- To combat terrorism relentlessly. They applaud the active and vigorous counterterrorism cooperation between the two countries and support more international efforts in this direction. Terrorism is a global scourge and the one we will fight everywhere. The two leaders strongly affirm their commitment to the conclusion by September of a UN comprehensive convention against international terrorism.

The Prime Minister's visit coincides with the completion of the Next Steps in Strategic Partnership (NSSP) initiative, launched in January 2004. The two leaders agree that this provides the basis for expanding bilateral activities and commerce in space, civil nuclear energy and dual-use technology.

Drawing on their mutual vision for the U.S.-India relationship, and our joint objectives as strong long-standing democracies, the two leaders agree on the following:

### FOR THE ECONOMY

- Revitalize the U.S.-India Economic Dialogue and launch a CEO Forum to harness private sector energy and ideas to deepen the bilateral economic relationship.

- Support and accelerate economic growth in both countries through greater trade, investment, and technology collaboration.
- Promote modernization of India's infrastructure as a prerequisite for the continued growth of the Indian economy. As India enhances its investment climate, opportunities for investment will increase.
- Launch a U.S.-India Knowledge Initiative on Agriculture focused on promoting teaching, research, service and commercial linkages.

FOR ENERGY AND THE ENVIRONMENT

- Strengthen energy security and promote the development of stable and efficient energy markets in India with a view to ensuring adequate, affordable energy supplies and conscious of the need for sustainable development. These issues will be addressed through the U.S.-India Energy Dialogue.
- Agree on the need to promote the imperatives of development and safeguarding the environment, commit to developing and deploying cleaner, more efficient, affordable, and diversified energy technologies.

FOR DEMOCRACY AND DEVELOPMENT

- Develop and support, through the new U.S.-India Global Democracy Initiative in countries that seek such assistance, institutions and resources that strengthen the foundations that make democracies credible and effective. India and the U.S. will work together to strengthen democratic practices and capacities and contribute to the new U.N. Democracy Fund.
- Commit to strengthen cooperation and combat HIV/AIDs at a global level through an initiative that mobilizes private sector and government resources, knowledge, and expertise.

FOR NON-PROLIFERATION AND SECURITY

- Express satisfaction at the New Framework for the U.S.-India Defense Relationship as a basis for future cooperation, including in the field of defense technology.
- Commit to play a leading role in international efforts to prevent the proliferation of Weapons of Mass Destruction.

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The U.S. welcomed the adoption by India of legislation on WMD (Prevention of Unlawful Activities Bill).

- Launch a new U.S.-India Disaster Relief Initiative that builds on the experience of the Tsunami Core Group, to strengthen cooperation to prepare for and conduct disaster relief operations.

### FOR HIGH-TECHNOLOGY AND SPACE

- Sign a Science and Technology Framework Agreement, building on the U.S.-India High-Technology Cooperation Group (HTCG), to provide for joint research and training, and the establishment of public-private partnerships.
- Build closer ties in space exploration, satellite navigation and launch, and in the commercial space arena through mechanisms such as the U.S.-India Working Group on Civil Space Cooperation.
- Building on the strengthened nonproliferation commitments undertaken in the NSSP, to remove certain Indian organizations from the Department of Commerce's Entity List.

Recognizing the significance of civilian nuclear energy for meeting growing global energy demands in a cleaner and more efficient manner, the two leaders discussed India's plans to develop its civilian nuclear energy program. President Bush conveyed his appreciation to the Prime Minister over India's strong commitment to preventing WMD proliferation and stated that as a responsible state with advanced nuclear technology, India should acquire the same benefits and advantages as other such states. The President told the Prime Minister that he will work to achieve full civil nuclear energy cooperation with India as it realizes its goals of promoting nuclear power and achieving energy security. The President would also seek agreement from Congress to adjust U.S. laws and policies, and the United States will work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India, including but not limited to expeditious consideration of fuel supplies for safeguarded nuclear reactors at Tarapur. In the meantime, the United States will encourage its partners to also consider this request expeditiously. India has expressed its interest in ITER [International Thermonuclear Experimental Reactor consortium] and a willingness to contribute.



The United States will consult with its partners considering India's participation. The United States will consult with the other participants in the Generation IV International Forum with a view toward India's inclusion.

The Prime Minister conveyed that for his part, India would reciprocally agree that it would be ready to assume the same responsibilities and practices and acquire the same benefits and advantages as other leading countries with advanced nuclear technology, such as the United States. These responsibilities and practices consist of identifying and separating civilian and military nuclear facilities and programs in a phased manner and filing a declaration regarding its civilians facilities with the International Atomic Energy Agency (IAEA); taking a decision to place voluntarily its civilian nuclear facilities under IAEA safeguards; signing and adhering to an Additional Protocol with respect to civilian nuclear facilities; continuing India's unilateral moratorium on nuclear testing; working with the United States for the conclusion of a multilateral Fissile Material Cut Off Treaty; refraining from transfer of enrichment and reprocessing technologies to states that do not have them and supporting international efforts to limit their spread; and ensuring that the necessary steps have been taken to secure nuclear materials and technology through comprehensive export control legislation and through harmonization and adherence to Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG) guidelines.

The President welcomed the Prime Minister's assurance. The two leaders agreed to establish a working group to undertake on a phased basis in the months ahead the necessary actions mentioned above to fulfill these commitments. The President and Prime Minister also agreed that they would review this progress when the President visits India in 2006.

The two leaders also reiterated their commitment that their countries would play a leading role in international efforts to prevent the proliferation of weapons of mass destruction, including nuclear, chemical, biological and radiological weapons.

In light of this closer relationship, and the recognition of India's growing role in enhancing regional and global security, the Prime Minister and the President agree that international institutions

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must fully reflect changes in the global scenario that have taken place since 1945. The President reiterated his view that international institutions are going to have to adapt to reflect India's central and growing role. The two leaders state their expectations that India and the United States will strengthen their cooperation in global forums.

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On September 8, 2005, Under Secretary for Political Affairs R. Nicholas Burns, and Under Secretary for Arms Control and International Security Robert G. Joseph testified before the House International Relations Committee regarding recent events in what Under Secretary Burns described as the strategic partnership of the United States and India. The full text of their prepared remarks, excerpted below, is available at [www.state.gov/p/us/rm/2005/52753.htm](http://www.state.gov/p/us/rm/2005/52753.htm).

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Under Secretary Burns:

. . . [I]t is in our national interest to develop a strong, forward looking relationship with the world's largest democracy as the political and economic focus of the global system shifts inevitably eastward to Asia.

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. . . We seek to work with India to win the global War on Terrorism, prevent the spread of weapons of mass destruction, enhance peace and stability in Asia, protect trade routes and sea lines of communication, and advance the spread of democracy. India and the United States now find ourselves on the same side on all of these critical strategic objectives. Our challenge, then, is to translate our converging interests into shared goals and compatible strategies designed to achieve those aims. In this context, the wide range of initiatives agreed to by President Bush and Prime Minister Manmohan Singh this July, including our agreement to promote civilian nuclear energy cooperation, represents a unique chance to

build trust between the United States and India because of the resonance all these programs have for both countries.

Our efforts to advance this bold agenda did not begin this summer. During the President's first term, the United States and India reinvigorated an Economic Dialogue, restarted the Defense Policy Group, expanded joint military exercises, began the India-U.S. Global Issues Forum, launched the High Technology Cooperation Group (HTCG), and set in motion other initiatives designed to foster bilateral cooperation on a number of key issues. Drawing on activities begun early in the first term, President Bush and then Prime Minister Vajpayee announced the Next Steps in Strategic Partnership (NSSP): a major initiative to expand high technology, missile defense, space and civilian nuclear cooperation while strengthening our nonproliferation goals.

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The Prime Minister's July visit coincided with the completion of the Next Steps in Strategic Partnership (NSSP) initiative that was launched eighteen months earlier. But we do not see the completion of the NSSP, however noteworthy, as an end in itself. Instead, the President and Prime Minister underscored that the NSSP provides a basis for expanding bilateral activities and commerce in space, civil nuclear energy, and dual-use technology. Indeed, the U.S.-India Civil Nuclear Cooperation initiative announced during the visit would not have been possible without the foundation laid by the completion of the NSSP.

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Under Secretary Joseph:

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As Under Secretary Burns testified, we believe that it is in our national security interest to establish a broad strategic partnership with India that encourages India's emergence as a positive force on the world scene. In the context of this partnership, and as part of the much larger agenda that has just been described, we reached a landmark agreement with India to work toward full cooperation in

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the civil application of nuclear energy while strengthening the nuclear nonproliferation regime.

India believes, and our Administration agrees, that it needs nuclear power to sustain dynamic economic growth and address its growing energy requirements in an affordable and environmentally-responsible manner. Our intent—in the context of the July 18 Joint Statement by the President and Prime Minister—is to provide India access to the technology it needs to build a safe, modern and efficient infrastructure that will provide clean, peaceful nuclear energy, one of the few proven sources of emissions-free energy that can provide the energy needed for a modern economy.

At the same time, India has agreed to take on key nonproliferation commitments that will bring it for the first time into the mainstream of the international nuclear nonproliferation community. This is a major positive move for India. While more can and will be done, India's implementation of its agreed commitments will, on balance, enhance our global nonproliferation efforts, and we believe the international nuclear nonproliferation regime will emerge stronger as a result.

### **Nonproliferation Gains**

Through the Joint Statement, India has publicly agreed to a number of important steps to prevent proliferation. It will now:

- Identify and separate civilian and military nuclear facilities and programs and file a declaration with the International Atomic Energy Agency (IAEA) regarding its civilian facilities;
- Place voluntarily its civilian nuclear facilities under IAEA safeguards;
- Sign and adhere to an Additional Protocol with respect to civilian nuclear facilities;
- Continue its unilateral moratorium on nuclear testing;
- Work with the U.S. for the conclusion of a multilateral Fissile Material Cut Off Treaty (FMCT) to halt production of fissile material for nuclear weapons;
- Refrain from the transfer of enrichment and reprocessing technologies to states that do not have them and support efforts to limit their spread; and

- Secure nuclear and missile materials and technologies through comprehensive export control legislation and adherence to the Missile Technology Control Regime (MTCR) and Nuclear Suppliers Group (NSG).

Indian officials have long indicated that India wants to aid international efforts to prevent the proliferation of nuclear, missile, chemical, and biological weapons. The Joint Statement makes explicit the specific actions it will undertake. These actions will bring India much closer to international nonproliferation norms and practices.

India's commitment to separate its civil and military facilities and place its civil facilities and activities under IAEA safeguards demonstrates its willingness to assume the responsibilities that other nations with civil nuclear energy programs have assumed. It will also help protect against diversion of nuclear material and technologies either to India's weapons program or to the weapons programs of other countries.

By adopting an Additional Protocol with the IAEA, India will commit to reporting to the IAEA on exports of all Trigger List items. This will help the IAEA track potential proliferation elsewhere.

By committing to adopt strong and effective export controls, including adherence to NSG and MTCR Guidelines, India will help ensure that its companies do not transfer sensitive weapons of mass destruction—(WMD) and missile-related technologies to countries of concern.

India has also agreed to work with the United States toward the conclusion of a multilateral FMCT and to maintain its nuclear testing moratorium.

By committing not to export enrichment and reprocessing technology to states that do not already have them, India will help us achieve the goals laid out by President Bush in February 2004, designed to prevent the further spread of such proliferation sensitive nuclear equipment and technology. This will help close what is widely recognized as the most significant loophole in the Nuclear Nonproliferation Treaty regime—a loophole that has been cynically manipulated by countries such as North Korea and Iran that have pursued the capability to produce fissile material under the guise of peaceful energy but for purposes of developing nuclear weapons.

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Each of these activities will help to strengthen the global regime. Together, they constitute a dramatic change in moving India into closer conformity with international nonproliferation standards and practices.

As befits a major, responsible nation, we hope that India will also take additional actions beyond those outlined in the July 18 Joint Statement in support of nonproliferation in the months and years ahead, and we look forward to working with the Indian Government and the international community to further strengthen nonproliferation efforts globally. Through our ongoing nonproliferation dialogue we have already discussed with India such steps as cooperating with us at the IAEA, endorsing the Proliferation Security Initiative Statement of Principles, and harmonizing its control lists with those of the Australia Group and Wassenaar Arrangement.

### **U.S. Commitments Under the Joint Statement**

On a reciprocal basis with India's commitments, the United States has agreed to work to achieve full civil nuclear energy cooperation with India. In this context, President Bush told Prime Minister Singh that he would:

- Seek agreement from Congress to adjust U.S. laws and policies;
- Work with friends and allies to adjust international regimes to enable full civil nuclear energy cooperation and trade with India; and
- Consult with partners on India's participation in the fusion energy International Thermonuclear Experimental Reactor (ITER) consortium and the Generation IV International Forum, the work of which relates to advanced nuclear energy systems.

To implement effectively the steps agreed in the Joint Statement, we will need the active support of Congress and that of our international partners. We expect—and have told the Indian government—that India's follow-through on its commitments will allow for our collective action. We believe that the Government of India understands this completely and we expect them to begin taking concrete steps in the weeks ahead.

### **International Responses to Date**

Mr. Chairman, many of our international partners have recognized the need to treat India differently and some have indicated their outright support. The United Kingdom, for instance, welcomed the initiative and noted its pleasure at India's willingness to take these steps as outlined in the Joint Statement. The Director General of the IAEA has also expressed his support, welcoming India's decision to place its civil nuclear facilities under IAEA safeguards and to sign and implement the Additional Protocol as "concrete and practical steps toward the universal application of IAEA safeguards." Others have told us that they look forward to normalizing their relations with India in the energy and nonproliferation communities.

Some have understandably questioned how this complex initiative comports with the NPT and our efforts to combat proliferation. Others have asked why a cap on India's production of fissile material for weapons was not part of the deal.

Let me clarify. The United States does not and will not support India's nuclear weapons program. Our initiative with India in no way recognizes India as an NPT nuclear weapon state and we will not seek to renegotiate the NPT. We remain cognizant of and will fully uphold all of our obligations under the Nuclear Nonproliferation Treaty. We remain committed to universal NPT adherence.

But we also recognize that India is a special case and see a clear need to come to terms with it. India never became a party to the NPT. In fact, India was very hostile toward the Treaty for many years. With its decision to take the steps announced in the Joint Statement, India will now take on new nonproliferation responsibilities that will strengthen global nonproliferation efforts and serve the fundamental purpose of the NPT.

India has informed us that it has no intention of becoming a party to the NPT as a non-nuclear weapon state at this time. Despite this, it is important to seize this opportunity to assist India in becoming a more constructive partner in our global nonproliferation efforts. Indian commitments to be undertaken in the context of the Joint Statement will align this critical state more closely with the global nonproliferation regime than at any time previously. India has said it wants to be a partner and is willing to take important

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steps to this end. We should encourage such steps in this case by offering tangible benefits in return.

We remain committed to achieving an Indian cessation of fissile material production for weapons, and we have strongly encouraged a move in this direction. However, achieving the physical separation of civilian and military infrastructure would be a significant step forward. And we jointly agreed to work toward the completion of an effective Fissile Material Cut Off Treaty, even as the United States stands willing to explore other intermediate options that also might serve this objective.

As India completes those nonproliferation actions that it has agreed to undertake in the Joint Statement, I am convinced that the nonproliferation regime will emerge stronger as a result. Separately, we will continue to encourage additional steps, such as India's acceptance of a fissile material production moratorium or cap, but we will not insist on it for the purposes of the civil nuclear cooperation initiative announced by the President and Prime Minister. Even absent such a cap, the initiative represents a substantial net gain for nonproliferation. It is a win for our strategic relationship, a win for energy security, and a win for nonproliferation.

### Key Challenges and Uncertainties

*Civil/Military split*—We have indicated that the separation of civil and military facilities must be credible and defensible from a nonproliferation standpoint to us and to our international friends and partners. India has not yet indicated how it intends to proceed on this score, but we will engage with India over the weeks and months ahead to develop a mutually acceptable approach to this key commitment. To strengthen the international nonproliferation regime and to meet our own expectations, the civil/military split must be comprehensive enough to strengthen the nuclear nonproliferation regime and to provide strong assurances to supplier states and the IAEA that materials and equipment provided as part of civil cooperation will not be diverted to the military sphere. Obviously, the number of facilities and activities that India places under IAEA safeguards, and the speed with which it does so, will directly affect the degree to which we will be able to build support for full



civil nuclear cooperation with India in Congress and in the Nuclear Suppliers Group.

*NSG Strategy*—In the coming weeks we intend to outline to NSG partners a number of approaches that will permit NSG countries to engage in civil nuclear cooperation with India without undermining the effectiveness of the this regime. We will engage at senior and expert levels, with the goal of securing agreement to permit the provision of NSG Trigger List items to India once it has taken the steps outlined in the Joint Statement.

*Other states*—We view India as an exceptional case, and see civil nuclear cooperation as a mechanism to deepen further India's commitment to international nonproliferation. Some have asked whether it might be possible to extend such cooperation to Israel and Pakistan—the only two other states that did not join the NPT. India, Israel, and Pakistan are each unique and require different approaches. Neither Pakistan nor Israel has a civil nuclear energy program that approximates that of India. The United States has no plans to seek full civil nuclear cooperation with Israel or Pakistan.

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Effective August 30, 2005, the Department of Commerce, Bureau of Industry and Security issued a rule removing license requirements for exports and reexports to India of items controlled unilaterally for nuclear nonproliferation reasons (i.e., items not subject to the Nuclear Suppliers Group) and removing certain Indian entities from the Entity List. *See* 70 Fed. Reg. 51,251 (Aug. 30, 2005). The new rule amends section 742.3(a)(2) of the Export Administration Regulations ("EAR") and removes the reference to India in the Commerce Country Chart (Supplement No. 1 to Part 738 of the EAR) with regard to nuclear nonproliferation. The rule also removed six Indian entities from the Entity List (Supplement No. 4 to Part 744 of the EAR); three of the entities were Indian Department of Atomic Energy entities, and the other three were Indian Space Research Organization entities.

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### *d. Russia*

#### *(1) HEU Agreement*

On September 30, 2005, the U.S. Departments of State and Energy and the Russian Federation Ministry of Foreign Affairs and Federal Atomic Energy Agency issued a joint statement marking the midpoint in the successful implementation of the Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium from Nuclear Weapons, known as the "HEU Agreement". The text of the joint statement is set forth below and available at [www.state.gov/r/pa/prs/ps/2005/54146.htm](http://www.state.gov/r/pa/prs/ps/2005/54146.htm).

September 2005 marks a significant milestone in the implementation of the HEU Agreement. Formally known as the Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium from Nuclear Weapons, dated 18 February 1993, the HEU Agreement is one of the most important instruments for cooperation between our two governments. Two hundred fifty metric tons of highly enriched uranium (HEU), equivalent to 10,000 nuclear warheads, have been converted to low enriched uranium (LEU). This accomplishment marks the halfway point towards the goal of eliminating 500 metric tons of HEU by 2013, when the Agreement is set to be fully implemented.

Under the HEU Agreement, the Russian Federation has agreed to process HEU extracted from dismantled nuclear warheads into LEU, which is used in the United States for the peaceful purpose of generation of electricity in commercial power reactors. To implement the HEU Agreement, the United States and the Russian Federation have entered into a number of additional agreements, including a package of agreements concluded on March 24, 1999, which established a mechanism for the disposition of the natural uranium component of the LEU. These agreements have been implemented, in part, through contracts between commercial companies, whose activities in implementation of these agreements are

carefully managed and overseen, as appropriate, by the U.S. and Russian Governments.

Pursuant to the HEU Agreement and the implementing contracts, 30 metric tons of Russian HEU are converted each year into LEU for use as fuel in U.S. nuclear power plants, generating approximately 10% of U.S. electricity. A unique feature of the HEU Agreement is that it is designed to realize its nuclear threat reduction goals without cost to the taxpayers of the United States or Russia. The appropriate payments and the return of the natural uranium feed component received by the Russian Federation ensure the Russian Federation's continued conversion of HEU into LEU under the Agreement and the construction and operation of facilities for this conversion, as well as a variety of other valuable activities, such as nuclear safety upgrades, conversion of military facilities to peaceful uses, and environmental clean-up.

Moreover, as noted by delegates of the United States and the Russian Federation at the Seventh Nuclear Nonproliferation Treaty (NPT) Review Conference held in New York in May of 2005, the HEU Agreement has played a valuable role in fulfilling the Article VI obligations of the United States and Russia under the NPT to pursue negotiations on nuclear disarmament.

The United States and the Russian Federation continue to support the HEU Agreement and its goals and recognize it as one of the most significant bilateral initiatives between our governments in the area of nuclear weapons dismantlement while attaining valuable energy and environmental benefits.

Consistent with the mutual policy of our governments to strengthen cooperation in this field, and considering the crucial role played by the HEU Agreement, the United States and the Russian Federation intend to ensure that the HEU Agreement is implemented successfully and without any hindrances to achieving this goal.

*(2) Nuclear security cooperation*

On February 24, 2005, President George W. Bush and Russian Federation President Vladimir Putin issued a joint statement on nuclear security cooperation in Bratislava, the text of which follows.

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The United States and Russia will enhance cooperation to counter one of the gravest threats our two countries face, nuclear terrorism. We bear a special responsibility for the security of nuclear weapons and fissile material, in order to ensure that there is no possibility such weapons or materials would fall into terrorist hands. While the security of nuclear facilities in the U.S. and Russia meet current requirements, we stress that these requirements must be constantly enhanced to counter the evolving terrorist threats. Building on our earlier work, we announce today our intention to expand and deepen cooperation on nuclear security with the goal of enhancing the security of nuclear facilities in our two countries and, together with our friends and allies, around the globe.

To this end the United States and Russia will continue and expand their cooperation on emergency response capability to deal with the consequences of a nuclear/radiological incident, including the development of additional technical methods to detect nuclear and radioactive materials that are, or may be, involved in the incident.

We will work together to help ensure full implementation of UN Security Council Resolution 1540 and early adoption of an International Convention on Nuclear Terrorism and the amended Convention on Physical Protection of Nuclear Material.

U.S. and Russian experts will share “best practices” for the sake of improving security at nuclear facilities, and will jointly initiate security “best practices” consultations with other countries that have advanced nuclear programs. Our experts will convene in 2005 a senior-level bilateral nuclear security workshop to focus increased attention on the “security culture” in our countries including fostering disciplined, well-trained, and responsible custodians and protective forces, and fully utilized and well-maintained security systems.

The United States and Russia will continue to work jointly to develop low-enriched uranium fuel for use in any U.S.- and Russian-design research reactors in third countries now using high-enriched uranium fuel, and to return fresh and spent high-enriched uranium from U.S.- and Russian-design research reactors in third countries.

The United States and Russia will continue our cooperation on security upgrades of nuclear facilities and develop a plan of work through and beyond 2008 on joint projects. Recognizing that the terrorist threat is both long-term and constantly evolving, in 2008 our countries will assess the joint projects and identify avenues for future cooperation consistent with our increased attention to the security culture in both countries.

We have established a bilateral Senior Interagency Group chaired by Secretary of Energy Bodman and Rosatom Director Rumyantsev for cooperation on nuclear security to oversee implementation of these cooperative efforts. A progress report will be due on July 1, 2005, and thereafter on a regular basis.

*e. European Union*

On June 20, 2005, the United States and the European Union released a joint statement on their work program concerning the nonproliferation of weapons of mass destruction. The full text of the joint statement, excerpted below, is available at [www.whitehouse.gov/news/releases/2005/06/20050620.html](http://www.whitehouse.gov/news/releases/2005/06/20050620.html).

\* \* \* \*

Proliferation of weapons of mass destruction (WMD) and their delivery systems continue to be a preeminent threat to international peace and security. . . .

The United States and the European Union are steadfast partners in the fight against the proliferation of weapons of mass destruction, and will undertake several new initiatives to strengthen our cooperation and coordination in this important arena, even as we enhance our ongoing efforts.

**Building Global Support for Nonproliferation:** The European Union and the United States will enhance information sharing, discuss assessments of proliferation risks, and work together to broaden global support for and participation in nonproliferation endeavors. We will increase transparency about our nonproliferation dialogues with other countries to ensure, to the extent possible consistency in our nonproliferation messages.

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We reaffirm our willingness to work together to implement and strengthen key arms control, disarmament and non-proliferation treaties, agreements and commitments that ban the proliferation of WMD and their delivery systems. In particular we underline the importance of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Biological and Toxin Weapons Convention and the Chemical Weapons Convention. We will increase our effort to promote, individually or, where appropriate, jointly, the universalisation of these Treaties and Conventions and the adherence to the Hague Code of Conduct against the proliferation of ballistic missiles.

\* \* \* \*

**Promoting Full Implementation of UNSCR 1540:** We will coordinate efforts to assist and enhance the work being done by the UNSCR 1540 Committee, and compliance with the resolution. We will work together to respond, where possible, to assistance requests from States seeking to implement the requirements set by the UNSC Resolution 1540 and in particular, to put in place national legal, regulatory, and enforcement measures against proliferation.

**Establishing a Dialogue on Compliance and Verification:** The European Union and the United States renew their call on all States to comply with their arms control, disarmament and non-proliferation agreements and commitments. We will seek to ensure, through regular exchanges, strict implementation of compliance with these agreements and commitments. We will continue to support the multilateral institutions charged with verifying activities under relevant treaties and agreements. We will ask our experts to discuss issues of compliance and verification in order to identify areas of possible cooperation and joint undertaking.

**Strengthening the IAEA:** The U.S. and the EU welcome the steps taken earlier this month by the Board of Governors of the IAEA that created a new Committee on Safeguards and Verification, which will enhance the IAEA's effectiveness and strengthen its ability to ensure that nations comply with their NPT safeguards obligations. We will work together to ensure all States conclude a comprehensive safeguards agreement and an Additional Protocol with the IAEA. We agree that the Additional Protocol should become a standard for nuclear cooperation and non-proliferation.

**Advancing the Proliferation Security Initiative:** As we enhance our own capabilities, laws and regulations to improve our readiness for interdiction actions, we pledge to strengthen the Proliferation Security Initiative and encourage PSI countries to support enhanced cooperation against proliferation networks, including tracking and halting financial transactions related to proliferation.

**Global Partnership:** The U.S. and the EU reaffirm our commitment to the Global Partnership Initiative Against the Spread of Weapons and Materials of Mass Destruction. We will assess ongoing and emerging threats and coordinate our nonproliferation cooperation, including with other participating states, to focus resources on priority concerns and to make the most effective use of our resources.

**Enhancing Nuclear Security:** We intend to expand and deepen cooperation to enhance the security of nuclear and radiological materials. We welcome the establishment of the Global Threat Reduction Initiative (GTRI) and will cooperate closely to implement this important new initiative, including by exploring opportunities under the GTRI to reduce the threat posed by radiological dispersal devices and by identifying specific radiological threat reduction projects that could be implemented.

**Ensuring Radioactive Source Security:** We remain concerned by the risks posed by the potential use of radioactive sources for terrorist purposes. We will work towards having effective controls applied by the end of 2005 in accordance with the IAEA Guidance on the Import and Export of Radioactive Sources. We will support IAEA efforts to assist countries that need such assistance to establish effective and sustainable controls.

\* \* \* \*

The U.S. and the EU take special note of the Conference to Consider and Adopt Amendments to the Convention on the Physical Protection of Nuclear Material (CPPNM) that will take place at the IAEA, July 4-8 2005, and we urge all States Parties to the CPPNM to attend and fully support adoption of an amended Convention.

On the same day, the United States and the European Union also issued a "Declaration on Enhancing Cooperation in

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the Field of Non Proliferation and the Fight Against Terrorism.”  
Excerpts relating to the nonproliferation commitments outlined follow; the full text of the declaration is available at [www.whitehouse.gov/news/releases/2005/06/20050620-1.html](http://www.whitehouse.gov/news/releases/2005/06/20050620-1.html).

\* \* \* \*

Fighting terrorism and the proliferation of weapons of mass destruction, coupled with the risk that such weapons could be acquired by terrorists, remain our greatest security challenges. In this context, we recall the 2004 Dromoland Castle Declarations on Combating Terrorism and on the Non-Proliferation of Weapons of Mass Destruction, which still provide the framework for our cooperation. We are fully committed to strengthen and support the important role of the United Nations in assisting member states in combating both challenges.

\* \* \* \*

We will further strengthen measures against the proliferation of weapons of mass destruction by state and non-state actors. In this context, we reaffirm our support for the Nuclear Non Proliferation Treaty and will continue to work together to strengthen it. We pledge to intensify our collaboration and coordination in promoting strict implementation of and compliance with relevant treaties, agreements and commitments on non proliferation. We will enhance the security of weapons-usable materials, facilities, and technology. We reaffirm also our willingness to work together to strengthen and universalise the disarmament and non-proliferation treaties and regimes that ban the proliferation of weapons of mass destruction and their delivery systems.

We will assist other states around the world to build stronger legal, regulatory, enforcement and other institutional capacity against proliferation. And we will work for more effective responses to address proliferation threats and prevent or remedy non-compliance. Our shared commitment to address proliferation threats is reflected in the “US-EU Joint Programme of Work on the Non-proliferation of Weapons of Mass Destruction.”

We remain united in our determination to see the proliferation implications of Iran’s advanced nuclear program resolved. Towards



that end, we reconfirm our full support for the ongoing European efforts to secure Iran's agreement to provide objective guarantees that its nuclear program is intended for exclusively peaceful purposes. As those discussions proceed, we urge Iran to abide fully by the terms of the November 2004 Paris Agreement and by the November 2004 IAEA Board of Governors resolution, including the need to suspend fully and verifiably all enrichment-related and re-processing activities. We reiterate the need for Iran to cooperate fully with IAEA requests for information and access, to comply fully with all IAEA Board requirements and resolve all outstanding issues related to its nuclear programme. Finally we call on Iran to ratify without delay the Additional Protocol and, pending its ratification, to act in accordance with its provisions.

We note with deep concern the DPRK's nuclear weapons program and its 10 February statement that it has manufactured nuclear weapons. The DPRK has clearly violated its commitments under the NPT and its IAEA safeguards agreement and other international non-proliferation agreements. The DPRK must comply fully with its non-proliferation obligations, and dismantle its nuclear weapons and nuclear weapons programs in a permanent, transparent, thorough, and verifiable manner. We stress that the Korean Peninsula should be free from nuclear weapons, the security and stability on the Peninsula be maintained and the nuclear issue be peacefully resolved through dialogue and negotiations. We fully reaffirm our support for the Six-Party Talks and believe this represents an important opportunity to achieve a comprehensive solution to the denuclearization of the Korean Peninsula.

## **2. Multilateral Efforts**

### ***a. Proliferation Security Initiative***

The Proliferation Security Initiative ("PSI"), announced by President Bush on May 31, 2003, seeks to establish cooperative partnerships worldwide to prevent the flow of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. *See Digest* 2003 at 1095-99. In March 2005 J. Ashley

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Roach, U.S. Department of State Office of the Legal Adviser, presented a paper entitled “Proliferation Security Initiative (PSI): Countering Proliferation by Sea” to a conference in Xiamen, China, Law of the Sea Issues in the East and South China Seas. Excerpts below provide a brief background and update on maritime aspects of the PSI. The full text of Mr. Roach’s paper, with annexes, is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). For more information on the PSI generally, see [www.state.gov/t/isn/c10390.htm](http://www.state.gov/t/isn/c10390.htm).

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### I. Development of the Proliferation Security Initiative (PSI)

In December 2002, two events occurred that led to development of the Proliferation Security Initiative.

#### Case of the Cambodian-flagged M/V SOSAN

On December 9, 2002, Spanish forces located 15 scud missiles, conventional warheads and rocket propellant under a cargo of cement after stopping this North Korean-owned vessel in the Arabian Sea that had sought to conceal its true identity and nationality. Only the cement was manifested. The vessel was said to be headed for Socotra. After consultations at the highest levels, on December 11, the vessel was permitted to proceed to Yemen.<sup>2</sup>

#### U.S. National Strategy to Combat Weapons of Mass Destruction

In December 2002, the U.S. National Strategy to Combat WMD was published.<sup>3</sup> It declared that combating WMD was a top national security priority for the United States. It called for enhanced interdiction capabilities. Interdiction was defined broadly, e.g., military, law enforcement, diplomacy.

<sup>2</sup> For details see Roach, “Initiative to enhance maritime security at sea,” 28 Marine Policy 41, 53-54 (2004) and Carla Anne Robbins, “The UN: Searching for Relevance: Operation Bypass: Why U.S. Gave U.N. No Role in Plan to Halt Arms Ships,” Wall St. J., Oct. 21, 2003, A1, available on line at 2003 WL-WSJ 398325.

<sup>3</sup> The text of the “National Strategy to Combat Weapons of Mass Destruction” is available on line at <http://www.state.gov/documents/organization/16092.pdf>.

Thereafter, President Bush launched the PSI on May 31, 2003 during a speech in Krakow, Poland as a cooperative framework to coordinate national actions supporting interdiction. . . .<sup>4</sup>

PSI thus began with eleven like-minded States (Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the US).<sup>5</sup> Over the following three months these countries developed a Statement of Interdiction Principles to which they agreed on September 4, 2003 in Paris.<sup>6</sup>

One year later on May 31, 2004, 61 nations joined together in Krakow to express broader political support for the Initiative.<sup>7</sup>

## II. Statement of Interdiction Principles

The Statement of Interdiction Principles represents a political commitment by States to use robustly their national capabilities to interdict shipments of nuclear, chemical, and biological weapons, related materials, and their means of delivery that are of proliferation concern.

The Statement of Principles specifically says that all actions will be taken consistent with national legal authorities and international law and frameworks.<sup>8</sup>

While the Statement of Interdiction Principles does not list countries of proliferation concern, participants noted in a statement from the July 2003 meeting in Brisbane, Australia, that North Korea and

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<sup>4</sup> "Remarks by the President to the People of Poland, Wawel Royal Castle, Krakow, Poland, May 31, 2003," text available on line at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

<sup>5</sup> See the statement of the Chairman of the first meeting of the PSI participants held in Madrid, Spain on June 12, 2003, available on line at [<http://www.state.gov/t/isn/rls/other/25382.htm>].

<sup>6</sup> The text of the Statement of Interdiction Principles is available on line at [<http://www.state.gov/t/isn/rls/fs/23764.htm> and <http://www.state.gov/t/isn/rls/other/34726.htm>]. See also the statement of the Chairman of the third meeting of the PSI participants held in Paris, September 3-4, 2004, available on line at [<http://www.state.gov/t/isn/rls/other/25425.htm>]. [Editor's note: The statement is also reprinted in *Digest 2003* at 1096-98].

<sup>7</sup> The text of the Chairman's statement at this first anniversary meeting, June 1, 2004, is available on line at [<http://www.state.gov/t/isn/rls/other/33208.htm>].

<sup>8</sup> This paper does not address those aspects of PSI dealing with proliferation by air and other modes of transport.

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Iran are of concern.<sup>9</sup> For its part, the United States has indicated publicly that Syria also is a country of concern.<sup>10</sup> Nevertheless, PSI efforts are not aimed at any one country, but at halting worldwide trafficking in WMD, delivery systems, and related materials.<sup>11</sup>

Key Maritime Commitments [are set out in paragraph 4a-d and f of the Statement of Interdiction Principles].

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### III. Bilateral Ship Boarding Agreements

At [an] October 2003 PSI meeting in London, the United States presented proposals to conclude bilateral shipboarding agreements, similar to its arrangements for counter narcotics shipboardings, to gain rapid consent to board vessels suspected of carrying WMD-related cargoes, consistent with the Statement of Interdiction Principles.

PSI participants welcomed the effort, provided comments on the US draft, and agreed that proceeding in bilateral manner would be the most productive way ahead.

In 2004, the United States concluded agreements with Panama, Liberia and the Marshall Islands.<sup>18</sup> Taken together, these . . . registries represent more than 30 percent of world's gross tonnage of merchant ships.<sup>19</sup>

Each of these countries indicated signing the agreements was meant to signal their registries were reliable and law abiding.

The United States is engaged in consultations and negotiations with more than 20 additional countries.

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<sup>9</sup> Statement of the Chairman of the second meeting of PSI participants held at Brisbane, Australia July 9-10, 2003, available on line at [<http://www.state.gov/t/isn/rls/other/25377.htm>.]

<sup>10</sup> Remarks of John R. Bolton, Under Secretary of State for Arms Control and International Security Affairs, . . . Tokyo, October 27, 2004, available on line at <http://www.state.gov/t/us/rm/37480.htm>.

<sup>11</sup> Remarks of John R. Bolton . . . at PSI meeting in Paris September 4, 2003, available on line at <http://www.state.gov/t/us/rm/23801.htm>.

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<sup>18</sup> The text of each agreement is available on line at [[www.state.gov/t/isn/c12386.htm](http://www.state.gov/t/isn/c12386.htm)].

<sup>19</sup> The 48 largest registries by number of ships are listed in Appendix II.

The United Kingdom has indicated it is pursuing similar agreements with several countries.

Operational Content of Agreements

The agreements establish the basis for any PSI shipboarding by:

- defining WMD as basis for boarding vessels flagged by bilateral treaty partners;
- stating that only commercial and private vessels are covered;
- establishing reciprocal rights and obligations;
- providing that the standard for any PSI shipboarding is the presence of “reasonable grounds to suspect” the vessel is engaged in this conduct;
- limiting the application of the agreements to international waters, i.e., “seaward of any State’s territorial sea”.

The agreements provide for communications between Competent Authorities who must be available at any time to receive, process and respond to requests for confirmation of nationality and boarding.

The process would normally begin by alerting the Competent Authority of the treaty partner, requesting confirmation of the nationality of the suspect vessel; and if nationality is confirmed, requesting authorization to board and search. The agreements list the items to be included in the requests. The request may be oral, but must be followed up with timely written request. The request would also include authorization to detain the vessel if evidence of proliferation by sea is found, as well as to detain the cargo and persons on board pending expeditious disposition instructions from the Competent Authority of the flag State.

The agreements list the range of possible responses by the Competent Authority if the vessel’s nationality is confirmed:

- conduct the boarding and search with its own security force officials;
- authorize the boarding by the requesting party;
- conduct the boarding and search together with the requesting party; or
- deny permission to board and search.

To avoid delay and the potential for destruction of evidence, the agreements provide a short timeline for the Competent Authority to

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respond to the requests to verify nationality and for authorization to board and search. Depending on the capabilities and necessary internal procedures of the flag State, the requested party is to respond within two (or more) hours of acknowledging receipt of requests.

The agreements also address what actions are permissible if, after acknowledging receipt of request, there is no further response to the request.

A model PSI shipboarding agreement is set out in Appendix I along with a more detailed analysis of most of its provisions, including their consistency with the international law of the sea.<sup>20</sup>

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### V. Maritime Training Exercises

One element of the Interdiction Principles [paragraph 2] is a commitment to maximize coordination among participants in interdiction efforts. This is being carried out, in the maritime context, in part through preparation for and participation in exercises.

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### VI. Case Study—BBC China

The *BBC China* was a German-owned ship (flagged in Antigua and Barbuda) that the UK and US had information was carrying uranium centrifuge parts to Libya. In early October 2003 a request was made to the German Government to search the ship. The German government agreed and had the owner, BBC Chartering & Logistic GmbH & Co., bring the ship in to the Italian port of Taranto where centrifuge parts were removed by Italian customs before permitting the ship to continue on its itinerary.<sup>24</sup>

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<sup>20</sup> A comprehensive analysis of these agreements may be found in Michael Byers, "Policing the High Seas: The Proliferation Security Initiative," 98 AJIL 526 (2004). [Editor's note: *see also* excerpts from the PSI agreement with Liberia and legal analysis, excerpted in *Digest 2004* at 1079-91.]

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<sup>24</sup> See John R. Bolton . . . Press Conference on PSI, Krakow, May 31, 2004, available on line at <http://www.state.gov/t/us/rm/33556.htm>, and William R. Hawkins, "Interdict WMD Smugglers at Sea," U.S. Naval Institute Proceedings, Dec. 2004, at 49-52, available on line at [http://www.military.com/NewContent/0%2C13190%2CNI\\_1204\\_Sea-P1%2C00.html](http://www.military.com/NewContent/0%2C13190%2CNI_1204_Sea-P1%2C00.html).

In the context of PSI the following points should be noted:

- only four States participated—demonstrating that it is not essential that all PSI participants be involved in an actual interdiction;
- information was essential to the success of the interdiction;
- cooperation of the owner of the vessel was essential;
- cooperation of the Italian port authorities was also essential to the interdiction;
- all activities were consistent with international and national legal requirements;
- the successful interdiction was a factor in Libya's decision to forego its nuclear weapons capabilities, and take key steps to rejoin the international community; and
- the interdiction helped unravel the A.Q. Khan network in black-market nuclear technology.(fn. omitted).

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## **VII. UN Security Council Resolution 1540**

The Proliferation Security Initiative is part of an overall counterproliferation effort intended to apply intelligence, diplomatic, law enforcement, and other available tools to prevent transfers of weapons of mass destruction and related items to countries and entities of concern. UN Security Council Resolution 1540, proposed by President Bush and adopted unanimously by the Security Council on April 28, 2004, calls on all States to take cooperative action to prevent trafficking in weapons of mass destruction.

UNSCR 1540 and the PSI Statement of Interdiction Principles are mutually reinforcing and are legally and politically compatible. UN Security Council Resolution 1540 recognizes the threat to international peace and security posed by the proliferation of WMD and outlines concrete actions States can take to counter this threat. Among other steps, operative paragraph 10 of UNSCR 1540 calls upon all States “in accordance with their national legal authorities and legislation and consistent with international law” to take cooperative action to stop, impede, intercept and otherwise prevent the illicit trafficking in these weapons, their means of delivery and related materials. The PSI and its Statement of Interdiction Principles iden-

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tify steps that can produce the kind of cooperation called for in UNSCR 1540. Accordingly, PSI is completely consistent with the UNSC Resolution. Furthermore, UNSCR 1540's decision under Chapter VII of the UN Charter that all States shall develop effective border, national export, transshipment, end-user and physical protection controls to prevent proliferation is consistent with and, in fact, bolsters the Statement of Interdiction Principles' call for nations to "review and work to strengthen their relevant national legal authorities where necessary ... [and] international law and frameworks in appropriate ways to support these commitments."<sup>27</sup>

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Remarks by Secretary of State Condoleezza Rice to commemorate the second anniversary of PSI on May 31, 2005, are excerpted below. The full text is available at [www.state.gov/secretary/rm/2005/46951.htm](http://www.state.gov/secretary/rm/2005/46951.htm).

\* \* \* \*

In the two years since the President's call to action, the cooperative efforts that we, and our PSI partners, have undertaken have made it increasingly difficult and costly for proliferators to ply their nefarious trade. Now, over 60 countries support the PSI and participation in the PSI is growing in every region of the world.

\* \* \* \*

Under PSI, customs and law enforcement officials are applying laws already on the books in innovative ways, and cooperating as never before to disrupt proliferation networks and to hold accountable the front companies that support them. We are cutting off the finances of those who facilitate the WMD trade and we are working to strengthen national and international laws against WMD trafficking in accordance with United Nations Security Resolution 1540.

In the course of the next 24 hours, authorities from the Czech Republic, Poland, and other countries in Central and Eastern

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<sup>27</sup> U.S. State Department Bureau of Nonproliferation Fact Sheet, "Proliferation Security Initiative Frequently Asked Questions (FAQ)," January 11, 2005, available on line at [<http://www.state.gov/t/isn/rls/fs/32725.htm>].



Europe will stop a shipment of chemical weapons—precursors . . . bound for the Middle East. Now, fortunately, this particular interdiction is only a drill—part of the PSI exercise Bohemian Guard. This will be the fifteenth PSI exercise in the last two years. And more exercises are planned in months ahead.

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. . . In the last nine months alone, the United States and ten of our PSI partners have quietly cooperated on 11 successful efforts. For example, PSI cooperation stopped the transshipment of material and equipment bound for ballistic missile programs in countries of concern, including Iran. PSI partners, working at times with others, have prevented Iran from procuring goods to support its missile and WMD programs, including its nuclear program. And bilateral PSI cooperation prevented the ballistic missile program in another region from receiving equipment used to produce propellant.

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In remarks to the Carnegie International Nonproliferation Conference on November 7, 2005, Under Secretary of State for International Security and Nonproliferation Robert G. Joseph discussed U.S.-initiated efforts to expand the objectives of PSI and its approaches “to cut off financial funding that fuels proliferation”:

In July, the G-8 Leaders called for enhanced efforts to combat proliferation through cooperation to identify, track and freeze relevant financial transactions and assets. This cooperation has already begun within the Egmont Group, a worldwide network of governmental financial agencies originally set up to combat money laundering. For our part, President Bush issued in June a new Executive Order that authorizes the U.S. Government to freeze assets and block transactions of entities and persons engaged in proliferation activities and support. Currently 16 entities—11 from North Korea, 4 from Iran, and one from Syria—have been designated under the Order, and we are working to designate additional ones. And the effort is working.

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The full text of Under Secretary Joseph's remarks is available at [www.state.gov/t/us/rm/56584.htm](http://www.state.gov/t/us/rm/56584.htm). On the new executive order, *see* 3.a. below.

Three new PSI bilateral ship boarding agreements were signed in 2005: (1) a U.S.-Croatia agreement signed on June 1, 2005, available at [www.state.gov/t/isn/trty/47086](http://www.state.gov/t/isn/trty/47086); (2) a U.S.-Cyprus agreement signed on July 25, 2005 (entered into force January 12, 2006), available at [www.state.gov/t/isn/trty/5274.htm](http://www.state.gov/t/isn/trty/5274.htm), and (3) a U.S.-Belize agreement signed on August 4, 2005 (entered into force October 19, 2005), available at [www.state.gov/t/isn/trty/50809.htm](http://www.state.gov/t/isn/trty/50809.htm). *See Digest 2004* at 1079-91 for excerpts from the PSI agreement with Liberia and accompanying article-by-article analysis.

### ***b. Non-Proliferation Treaty Review Conference***

Pursuant to Article VIII of the Treaty on the Nonproliferation of Nuclear Weapons ("NPT"), a majority of states parties can call for review conferences at five-year intervals to assure that the purposes of the Preamble and the provisions of the NPT are being realized. The Preparatory Commission for the 2005 Review Conference met in April 2002, April/May 2003, and April/May 2004. In May the 2005 Review Conference was held in New York. Excerpts from a May 2, 2005, speech to the Review Conference by then Assistant Secretary of State for Arms Control Stephen G. Rademaker, are provided below; the full text of his speech is available at [www.state.gov/t/ac/rls/rm/45518.htm](http://www.state.gov/t/ac/rls/rm/45518.htm).

The Nuclear Non-Proliferation Treaty (NPT) is a key legal barrier against the spread of nuclear weapons and material related to the production of such weapons. That we can meet today, 35 years after the Treaty entered into force, and not count 20 or more nuclear weapon states—as some predicted in the 1960s—is a sign of the Treaty's success. NPT parties can be justly proud of the NPT's contribution to global security.

Nearly 190 states are now party to the Treaty, the greatest number of parties to any multilateral security agreement, save the

United Nations Charter. We are pleased that so many of the states party have gathered in this great hall for the Seventh Review Conference of the NPT.

The NPT is fundamentally a treaty for mutual security. It is clear that the security of all member states depends on unstinting adherence to the Treaty's nonproliferation norms by all other parties. The Treaty's principal beneficiaries are those member states that do *not* possess nuclear weapons because they can be assured that their neighbors also do not possess nuclear weapons. Strict compliance with nonproliferation obligations is essential to regional stability, to forestalling nuclear arms races, and to preventing resources needed for economic development from being squandered in a destabilizing and economically unproductive pursuit of weapons.

There has been important progress in advancing the NPT's objectives. One clear success is the recent Libyan decision to abandon its clandestine nuclear weapons program, a program aided by the A. Q. Khan network. Libya should be commended for making the strategic decision to return to NPT compliance, to voluntarily give up its nuclear weapons program, and to cooperate with the IAEA and others. In doing so, it moved to end its damaging international isolation and paved the way for improved relations with the international community.

Libya has joined other states, including South Africa, Ukraine, Belarus, and Kazakhstan, that have wisely concluded that their security interests are best served by turning away from nuclear weapons and coming into full compliance with the NPT as non-nuclear weapon states. This demonstrates that, in a world of strong nonproliferation norms, it is never too late to make the decision to become a fully compliant NPT state. In all of these cases, including the most recent case of Libya, such a decision was amply rewarded.

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. . . Today, the Treaty is facing the most serious challenge in its history due to instances of noncompliance. Although the vast majority of member states have lived up to their NPT nonproliferation obligations that constitute the Treaty's most important contribution to international peace and security, some have not.

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Indeed . . . some continue to use the pretext of a peaceful nuclear program to pursue the goal of developing nuclear weapons. We must confront this challenge in order to ensure that the Treaty remains relevant. This Review Conference provides an opportunity for us to demonstrate our resolve in reaffirming our collective determination that noncompliance with the Treaty's core nonproliferation norms is a clear threat to international peace and security.

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By secretly pursuing reprocessing and enrichment capabilities in order to produce nuclear weapons, North Korea violated both its safeguards obligations and its nonproliferation obligations under the NPT before announcing its intention to withdraw from the Treaty in 2003. In recent months, it has claimed to possess nuclear weapons. For almost two decades Iran has conducted a clandestine nuclear weapons program, aided by the illicit network of A. Q. Khan. After two and a half years of investigation by the IAEA and adoption of no fewer than seven decisions by the IAEA Board of Governors calling on Iran to cooperate fully with the IAEA in resolving outstanding issues with its nuclear program, many questions remain unanswered. Even today, Iran persists in not cooperating fully. Iran has made clear its determination to retain the nuclear infrastructure it secretly built in violation of its NPT safeguards obligations, and is continuing to develop its nuclear capabilities around the margins of the suspension it agreed to last November, for example, by continuing construction of the heavy water reactor at Arak, along with supporting infrastructure.

Pursuit of nuclear weapons by noncompliant states is not the only threat to the NPT. New challenges have emerged from non-state actors.

One category of problematic non-state actors consists of individuals acting in their own self-interest who have helped facilitate proliferation. For many years the A. Q. Khan nuclear smuggling network provided nuclear technology and materials—even weapon designs—to NPT violators through a widespread, illicit procurement network. While this network has been disbanded, we are still uncovering and repairing the damage it has wrought upon the nuclear nonproliferation regime. It is imperative that no other networks take its place.

A second category of problematic non-state actors consists of terrorist organizations who magnify the threat of proliferation by potentially placing nuclear weapons in the hands of those determined to use them. It is no secret that terrorists want to acquire weapons of mass destruction, including nuclear weapons. The consequences if they succeed would be catastrophic. We must take every possible step to thwart their efforts. This means improving the security of nuclear materials, stopping illicit nuclear trafficking, strengthening safeguards, establishing and enforcing effective export controls, and acting decisively to dismantle terrorist networks everywhere.

Last year, President Bush proposed an action plan to prevent further nuclear proliferation and to address each of these needs. . . .

The United States continues to work with others to advance other elements of the President's action plan, including:

- Universalizing adherence to the Additional Protocol and making it a condition of nuclear supply, which will strengthen the means to verify NPT compliance;
- Restricting the export of sensitive technologies, particularly the spread of enrichment and reprocessing technology, which will close a key loophole in the NPT;
- Creating a special safeguards committee of the IAEA Board of Governors, which will focus the attention of the Board on issues central to the purpose of the Treaty;
- Strengthening the Proliferation Security Initiative to intercept and prevent illicit shipments of weapons of mass destruction, their delivery systems, and related materials, which is a critical adjunct to the work of the Treaty undertaken by nations acting to defeat proliferation threats; and
- Expanding the "Global Partnership" to eliminate and secure sensitive materials, including weapons of mass destruction, which broadens U.S. and Russian efforts aimed at cooperative threat reduction.

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. . . The benefits of peaceful nuclear cooperation comprise an important element of the NPT. Through substantial funding and technical cooperation, the United States fully supports peaceful nu-

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clear development in many states, bilaterally and through the IAEA. But the language of Article IV is explicit and unambiguous: states asserting their right to receive the benefits of peaceful nuclear development must be in compliance with their nonproliferation obligations under Articles I and II of the NPT. No state in violation of Articles I or II should receive the benefits of Article IV. All nuclear assistance to such a state, bilaterally or through the IAEA, should cease. Again, we hope the deliberations at this Review Conference will endorse this proposition.

Which brings us back to the compliance challenges of North Korea and Iran. On North Korea, we are attempting to bring together the regional players in the Six-Party Talks to convince Pyongyang that its only viable option is to negotiate an end to its nuclear ambitions. We have tabled a proposal that addresses the North's stated concerns and also provides for the complete, verifiable, and irreversible elimination of North Korean nuclear programs.

As to Iran, Britain, France, and Germany, with our support, are seeking to reach a diplomatic solution to the Iranian nuclear problem, a solution that given the history of clandestine nuclear weapons work in that country, must include permanent cessation of Iran's enrichment and reprocessing efforts, as well as dismantlement of equipment and facilities related to such activity. Iran must provide such objective and verifiable guarantees in order to demonstrate that it is not using a purportedly peaceful nuclear program to hide a nuclear weapons program or to conduct additional clandestine nuclear work elsewhere in the country.

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The United States remains fully committed to fulfilling our obligations under Article VI. Since the last review conference the United States and the Russian Federation concluded our implementation of START I reductions, and signed and brought into force the Moscow Treaty of 2002. Under the Moscow Treaty, we have agreed to reduce our operationally deployed strategic nuclear warheads to 1,700-2,200, about a third of the 2002 levels, and less than a quarter of the level at the end of the Cold War. When this Treaty is fully implemented by the end of 2012, the United States will have reduced the number of strategic nuclear warheads it had deployed in 1990 by

about 80%. In addition, we have reduced our non-strategic nuclear weapons by 90% since the end of the Cold War, dismantling over 3,000 such weapons pursuant to the Presidential Nuclear Initiatives of 1991 and 1992. We have also reduced the role of nuclear weapons in our deterrence strategy and are cutting our nuclear stockpile almost in half, to the lowest level in decades.

. . . [W]e have eliminated thousands of nuclear weapons, eliminated an entire class of intermediate-range ballistic missiles, taken B-1 bombers out of nuclear service, reduced the number of ballistic missile submarines, drastically reduced our nuclear weapons-related domestic infrastructure, and are now eliminating our most modern and sophisticated land-based ballistic missile. We have also spent billions of dollars, through programs such as Nunn-Lugar, to help other countries control and eliminate their nuclear materials. We are proud to have played a leading role in reducing nuclear arsenals.

More can be done, of course. For example, we have called upon the Conference on Disarmament to initiate negotiations on a Fissile Material Cut-off Treaty (FMCT). We believe that an FMCT would help to promote nuclear nonproliferation by establishing the universal norm that no state should produce fissile material for weapons. For its part, the United States ceased production of fissile material for weapons purposes nearly two decades ago. Today we reiterate the call we issued last year at the Conference on Disarmament for all nations committed to the FMCT to join us in declaring a moratorium on fissile material production for weapons purposes until a binding FMCT has been concluded and entered into force.

We intend to provide much more detailed information about the steps we have taken in accordance with Article VI at a later point during this Conference. The full record will leave no doubt about the commitment of the United States to fulfillment of its Article VI obligations.

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Following the May Review Conference, on June 30, 2005, Principal Deputy Assistant Secretary for Nonproliferation Andrew K. Semmel addressed the NATO Senior Group meeting in Sofia, Bulgaria, on proliferation of WMD. Excerpts fol-

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low; the full text of Mr. Semmel's speech is available at  
[www.state.gov/t/isn/rls/rm/49006.htm](http://www.state.gov/t/isn/rls/rm/49006.htm).

\* \* \* \*

... In recent years, NPT parties such as North Korea and Iran have sought nuclear weapons in violation of their nonproliferation and safeguards obligations under the Treaty. They were aided by a clandestine nuclear trading network that spread sensitive technologies. Despite considerable international pressure, neither North Korea nor Iran has yet made the strategic decision to abandon its pursuit of nuclear weapons. All these developments substantially increase the danger that terrorists could acquire nuclear capabilities, a goal to which they aspire.

It was the hope of the United States that the Seventh NPT Review Conference, which concluded at the end of May, would address these growing threats and engage constructively in a month-long discussion of ways to strengthen implementation of the Treaty. Our starting point was President Bush's March 7 statement commemorating the NPT's 35th anniversary in which he called for strong action to confront noncompliance with the Treaty's nonproliferation undertakings.

On the opening day of the Conference, the Secretary General of the United Nations, the Director General of the IAEA and many others—including members of NATO—highlighted the difficult challenges to the NPT that the Conference needed to address. That these issues were raised and discussed by a large number of states during the Conference is a positive step. It is unfortunate that protracted procedural maneuvering led by Iran and Egypt greatly limited the time for substantive discussion and negotiation in the three Main Committees, and effectively prevented any serious effort to achieve a consensus document on the significant issues before the Conference. We need to consider what steps to take now or in the future to prevent a recurrence of such procedural disruptions. We believe that these procedural problems or the lack of a consensus final declaration do not signal anything negative about the health of the NPT. Three out of six previous Review Conferences were also unable to reach consensus on a substantive final declaration. Of



more importance is the fact that within the time allotted for substantive discussion, and in informal exchanges, the focus of many delegations was on the challenges facing the NPT and how most effectively to address them.

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With regard to the nuclear weapon programs of North Korea and Iran, the United States supports ongoing efforts to resolve these matters peacefully through diplomacy. We and our partners in the Six-Party Talks hope that North Korea will rejoin the talks and commit to the complete, verifiable, and irreversible dismantlement of all of its nuclear programs. These talks offer the best opportunity to resolve this issue. Regarding Iran, the United States supports the efforts of Britain, France, and Germany, supported by the EU High Commissioner, seeking a negotiated long-term resolution of Iran's nuclear program. Given its history of clandestine nuclear activities, safeguards violations, and documented efforts to deceive the international community, Iran must now demonstrate that it no longer seeks to acquire a nuclear weapons capability. Only the full cessation and dismantling of Iran's fissile material production efforts can begin to give us any confidence that Iran is no longer pursuing a nuclear weapons capability.

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It is important to stress that the central emphasis on nonproliferation has not, should not, and will not diminish the importance of the disarmament and peaceful uses provisions of the Treaty. Some [non nuclear weapon states] NNWS have responded to the greater importance placed on nonproliferation by claiming that the other goals of the Treaty have been downplayed or ignored in recent years. Nothing could be further from the truth. There is absolutely nothing in the recently concluded NPT review process to justify such a charge.

For its part, the United States went to great lengths during the recent NPT review process to affirm its commitment to Articles IV and VI and to set out our record. We know that some question the pace and means by which the United States has reduced its reliance on nuclear weapons, but we believe the facts speak for themselves and we remain prepared to consult, discuss and explain in order to

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advance mutual understanding. At the same time, it would have been irresponsible to ignore the reality that the NPT's nonproliferation objectives were under threat from a few NNWS that sought nuclear weapons in violation of the Treaty. It was also clear that some NPT parties do not place enough emphasis on dealing with Articles I, II and III relative to their continued strong focus on Article VI.

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. . . [W]e must be able to adapt to changing proliferation circumstances and utilize a full range of tools. We must have a global nonproliferation regime or comprehensive architecture in place and in practice that ranges from limiting access to dangerous materials and technology by securing them at their source, to enacting export and border controls, to impeding WMD-related shipments during transport, and to enforcing domestic regulatory and administrative practices to guard against illegal proliferation activity. The NPT is at the core of this architecture. Without a global consensus as embodied in the NPT, we could not marshal enough support to tackle these complex problems.

An effective nuclear nonproliferation regime, therefore, requires both concrete complementary actions, such as those that I have just outlined, and a vibrant NPT. We must spare no effort to confirm our support for the Treaty and continue our collective efforts to ensure its lasting efficacy and credibility. We all have a role in that process and each has a vital stake in the outcome.

### ***c. International Atomic Energy Agency—Special Committee on Safeguards and Verification***

On June 17, 2005, the White House announced the action by the IAEA Board of Governors to create the Special Committee on Safeguards and Verification, a committee originally proposed by President Bush in his address to the National Defense University in February 2004. *See Digest 2004* at 1072-77. A press release on the creation of the committee is available at [www.whitehouse.gov/news/releases/2005/06/20050617-6.html](http://www.whitehouse.gov/news/releases/2005/06/20050617-6.html). Excerpts below from a February 2005 statement by the United States on IAEA Board of Governors "agenda

item 8: Creation of a Special Committee on Safeguards and Verification” describe the U.S. vision of the role and purpose of the Special Committee. The full text of the statement is available at [http://vienna.usmission.gov/\\_index.php?cmd=cmdFront-endSpeechesAndRelatedDocumentsDetail&speechid=17](http://vienna.usmission.gov/_index.php?cmd=cmdFront-endSpeechesAndRelatedDocumentsDetail&speechid=17).

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...[M]atters related to safeguards and verification have occupied a considerable amount of th[e IAEA] Board’s work during the past two to three years. Besides addressing such serious matters, the IAEA also has to deal with a new threat—a covert nuclear supply network. Moreover, during this period of time, one state announced its withdrawal from the Nuclear Nonproliferation Treaty and is boldly developing nuclear weapons. These challenges are too big, too diverse, and too difficult for any one state to manage alone. Much like this Board . . . address[ed] the ambitious, covert nuclear weapons program pursued by the former regime in Iraq, we must now combine our talents to combat and defeat this scourge of proliferation. By focusing our work in the Special Committee, we hope to be able to develop measures that will enhance the IAEA’s capabilities to detect, deter, and prevent nuclear proliferation.

To this end, the revised draft terms of reference that has been circulated by the Secretariat offers a much-improved proposal for the work of the Special Committee. We have, for example, modified our position on membership. We can agree that the Committee shall be open ended. This position, however, is without prejudice to our other proposal on membership that we will submit for consideration by the Special Committee, i.e., that countries under investigation for non-technical violations of their nuclear non-proliferation and safeguards obligations should elect not to participate in discussions by the Board or the Special Committee regarding their own cases.

The United States would classify the mission of the proposed Special Committee into two broad clusters. The first would be to serve as a forum for handling routine safeguards-related issues. Into this category, we would include matters related to the review of the annual Safeguards Implementation Report (SIR), and to the

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studies undertaken by the Agency and member states to achieve universal adherence to Safeguards Agreements and Additional Protocols. Under this mission, the Committee could review past agency actions to ascertain ways to strengthen the safeguards system [and] determine the extent to which . . . enhanced measures have been fully implemented by the Agency, and assess whether those measures have proven to be effective and cost efficient. In addressing such issues, the Committee would have a role similar to those played by the Program and Budget Committee and the Technical Assistance and Cooperation Committee, and, like these Committees, the proposed Special Committee on Safeguards would not have authority to interfere with the day-to-day management of the Department of Safeguards.

As envisaged, the second general mission of the Committee would be forward-looking in nature. In this role, the Committee would seek to improve the effectiveness and efficiency of the safeguards system. The Agency's inspectorate has had to face new, unexpected and expanding challenges in the past few years, including the untangling of a dangerous covert nuclear supply network, as well as investigations of covert nuclear programs, which included hidden nuclear facilities, undeclared material and undeclared activities. These investigations may require new or innovative measures to bring them to a successful close. We also believe the Committee should study whether there are any measures that could be brought to bear on emerging proliferation threats emanating from non-state actors.

We believe the proposed Committee should assess whether the Agency has been using all of the tools at its disposal. Put another way, are agency inspectors exercising the full range of their inspection rights? Are there any new technical measures, requiring no changes to safeguards agreements, that could be brought to bear on difficult investigations? Are there any cutting edge technologies that could be applied by Agency inspectors? Are these measures technically sound and cost-effective? Would giving inspectors greater rights of access contribute to a more effective and efficient program?

The international community must be vigilant and take concerted action to respond to the latest nuclear proliferation challenges. Just as the international community responded to the serious non-proliferation challenges of the early 1990s, we have to

take stock of recent developments and adapt the safeguards system accordingly. The nuclear proliferation threat is not static and neither should we. The safeguards system needs to adjust to the changing threat that we all confront. I hope we can agree that that ought to be one of our main tasks.

...[T]he Special Committee, as proposed, would be advisory in nature; it would be created by the Board, be of the Board, and deliberate on behalf of the Board. The Special Committee would have no independent decision-making authority and would not be able to intervene in the day-to-day operations of the Department of Safeguards. Any recommendations emanating from the Committee would be reviewed by the Board, and accepted, rejected, ignored, or modified as the Board sees fit. Of course, we anticipate that the Committee would provide a catalyst for new ideas, and new methodologies that could be helpful for keeping pace with the changing international security environment, as they relates to safeguards.

The Special Committee role is intended to be additive to the Board's and Agency's work, not duplicative. It would not dilute any activity of the Agency or the Board. Instead, the Committee actions are intended to strengthen the Agency efficiency and effectiveness by augmenting the work of the Board.

My Government believes that the Special Committee on Safeguards and Verification can help strengthen all the pillars of the IAEA—technology, safety and verification. . . .

***d. 2005 protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to its Protocol on Fixed Platforms***

On October 14, 2005, an International Maritime Organization ("IMO") Diplomatic Conference in London adopted the 2005 Protocol to the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA") and the related Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf ("Fixed Platforms Protocol"). As noted in Chapter 3.B.1.e., the SUA Convention and the Fixed Platforms Protocol are two of the twelve UN counterterrorism conven-

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tions. The 2005 protocols amend the SUA Convention and the Fixed Platforms Protocol to add significant measures with regard to nonproliferation, counterterrorism and law enforcement. The texts of the protocols are available in IMO Docs. LEG/CONF.15/21 and LEG/CONF.15/22 (Nov. 21, 2005), at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

Excerpts below from an October 21, 2005, Department of State fact sheet describe key provisions, particularly with regard to the SUA protocol. The fact sheet is available at [www.state.gov/t/isn/rls/fs/58322.htm](http://www.state.gov/t/isn/rls/fs/58322.htm).

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The Protocols resulted from more than three years of intensive negotiations. They will open for signature on February 14, 2006; the SUA Protocol enters into force 90 days after the twelfth country (three countries in the case of the Fixed Platforms Protocol) signs it without reservation as to ratification, acceptance or approval (or deposits an instrument to that effect).

The SUA Protocol provides the first international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs.

The SUA Protocol also establishes a mechanism to facilitate the boarding in international waters of vessels suspected of engaging in these activities.

The new nonproliferation offenses strengthen the international legal basis to impede and prosecute the trafficking of WMD, their delivery systems and related materials on the high seas in commercial ships by requiring state parties to criminalize such transport. These transport offenses are subject to specific knowledge and intent requirements that ensure the protection of legitimate trade and innocent seafarers. The nonproliferation offenses are consistent with existing international nonproliferation treaties, and the SUA Protocol explicitly provides that the rights, obligations and responsibilities of States under international law—including the Nuclear Nonproliferation Treaty (NPT), the Chemical Weapons Conven-

tion (CWC), and the Biological Weapons Convention (BWC)—are not affected.

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The ship boarding provisions establish a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel that is suspected of being involved in a SUA offense. Consistent with existing international law and practice, SUA boardings can only be conducted with the express consent of the flag state. In addition to eliminating the need to create time-consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity, the ship boarding provisions provide robust safeguards that ensure the protection of innocent seafarers.

Article 3*bis* of the 2005 SUA Protocol creates specific offenses if a person unlawfully and intentionally:

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon\* in a manner that causes or is likely to cause death or serious injury or damage; or

(ii) discharges from a ship oil, liquefied natural gas, or other hazardous or noxious substance . . . , in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens . . . [to commit such an offense] or;

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause,

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\* Editor's note: Article 2 of the 2005 Protocol amends Article 1 of the SUA Convention. Article 1.d of the amended Convention defines a "BCN weapon" as biological weapons, chemical weapons, and nuclear weapons and other nuclear explosive devices.

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death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;

(ii) any BCN . . . knowing it to be a BCN weapon;

(iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

Article 8*bis* of the 2005 Protocol to the Convention discusses cooperation and procedures to be followed regarding shipboarding if there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offense under the Convention.

The 2005 Protocol to the Fixed Platforms Protocol reflects the amendments of the 2005 Protocol to the SUA Convention. In particular, tracking the elements of Article 3*bis*(a) of the 2005 Protocol to the SUA Convention, Article 2*bis* of the 2005 Protocol to the Fixed Platforms Protocol expands offenses to include the use against or on a fixed platform or the discharge from a fixed platform of substances covered in 3*bis*(a)(1) and (2) for ships, as well as threats to do so.

On September 22, 2005, the United States submitted comments providing the views of the United States on the counterterrorism, nonproliferation and boarding provisions in particular. IMO Doc LEG/CONF.15/15 (dated September 20, 2005), available at [www.state.gov/t/isn/trty/58319.htm](http://www.state.gov/t/isn/trty/58319.htm). See also Chapter 3.B.1.e.



***e. Convention on the Physical Protection of Nuclear Material***

On July 8 2005, the United States participated with 87 other countries and the European Atomic Energy Community ("EURATOM") at a Conference convened for the purpose of amending the Convention on the Physical Protection of Nuclear Material ("CPPNM"). The participants adopted by consensus an amendment to the CPPNM that would make fundamental changes to and strengthen the Convention. The text of the Final Act is reprinted in the report by the Director General, GOV/INF/2005/10-GC(49)/INF/6, available at [www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf](http://www.iaea.org/About/Policy/GC/GC49/Documents/gc49inf-6.pdf).

In particular, the amendment would require States Parties to the Convention for whom the Amendment enters into force to establish a physical protection regime to protect nuclear facilities used for peaceful purposes and nuclear material used for peaceful purposes in domestic use, storage, and transport and would change the name of the Convention to reflect the application to nuclear facilities. It would also provide for expanded cooperation between and among States concerning measures to locate and recover stolen or smuggled nuclear material, to mitigate any radiological consequences of sabotage, and to prevent and combat related offenses. The original Convention was more limited in scope with respect to physical protection of nuclear material in domestic (as opposed to international) use, storage and transport. The amendment will enter into force on the 30<sup>th</sup> day after the date on which two-thirds of the 112 States Parties to the Convention have deposited their instruments. The provision of the amendment relating to punishable offenses is discussed in Chapter 3.B.1.b.(2).

Of particular relevance for nonproliferation is article 6 of the amendment, which adds a new article 2A to the Convention. This new article requires States Parties to

establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities under its jurisdiction, with the aim of:

(a) protecting against theft and other unlawful taking of nuclear material in use, storage and transport;

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(b) ensuring the implementation of rapid and comprehensive measures to locate and, where appropriate, recover missing or stolen nuclear material; when the material is located outside its territory, that State Party shall act in accordance with article 5 [providing for cooperation in such matters];

(c) protecting nuclear material and nuclear facilities against sabotage; and

(d) mitigating or minimizing the radiological consequences of sabotage.

Article 2A.2 requires States Parties to “establish and maintain a legislative and regulatory framework to govern physical protection,” “establish or designate a competent authority or authorities responsible for the implementation of the legislative and regulatory framework,” and “take other appropriate measures necessary for the physical protection of nuclear material and nuclear facilities.” Finally, Article 2A.3 requires States Parties to “apply insofar as is reasonable and practicable” enumerated “Fundamental Principles of Physical Protection of Nuclear Material and Nuclear Facilities.”

Both the full text of the amendment, as well as a consolidated version of the CPPNM (with amendments), are available at [www.iaea.org/Publications/Documents/Conventions/cppnm.html](http://www.iaea.org/Publications/Documents/Conventions/cppnm.html).

In an address to the National Strategy Forum on November 14, 2005, Deputy Assistant Secretary of State for Nuclear Nonproliferation Andrew Semmel stated:

The United States is aggressively committed to improving the physical protection of nuclear weapons and materials through a number of nonproliferation assistance programs. . . . [The CPPNM amendment] is a crucial Amendment that significantly strengthens that Convention to address illicit trafficking in nuclear and non-nuclear radiological material and the potential for malevolent use. The Amendment is intended to accomplish three purposes:

- to achieve and maintain worldwide effective physical protection of nuclear material and nuclear facilities used for peaceful purposes;

- to prevent and combat offences relating to such material and facilities worldwide; and
- to facilitate co-operation among States Parties to those ends.

In sum, it provides a treaty-based anchor for an international regime for the physical protection worldwide of nuclear material and facilities used for peaceful purposes.

The full text of Mr. Semmel's address is available at [www.state.gov/t/isn/rls/rm/56942.htm#beginpage%20tabindex1](http://www.state.gov/t/isn/rls/rm/56942.htm#beginpage%20tabindex1).

**f. Nuclear Terrorism Convention**

The International Convention for the Suppression of Nuclear Terrorism ("Nuclear Terrorism Convention"), adopted by the UN General Assembly in April 2005, U.N. Doc. A/RES/59/290 (2005), is discussed in A.2. *supra* and in Chapter 3.B.1.b.(1). As to nuclear nonproliferation, the convention requires States Parties to take steps to render harmless relevant materials, devices or facilities, to ensure that material is subject to safeguards, to apply adequate physical protections, and to return relevant materials, devices or facilities, when possible, to the State Party to which it belongs (or to provide assurances of peaceful use for any such materials, devices or facilities that cannot be returned). Ambassador Stuart Holliday, Alternate U.S. Representative to the UN for Special Political Affairs, explained:

The Nuclear Terrorism Convention recognizes the right of all States to develop and apply nuclear energy for peaceful purposes. This right, of course, is predicated on ensuring that development of nuclear energy for peaceful purposes is not used as a cover for nuclear proliferation. UN Security Council Resolution 1540, adopted unanimously in April 2004, as well as other resolutions adopted by UN members in other fora, affirm this, and we are pleased that it appears well understood by the international community generally, and by those involved in bringing this Convention forward.

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Ambassador Holliday's remarks are further excerpted in Chapter 3.B.1.b.(1) and are available in full at [www.un.int/usa/05\\_068.htm](http://www.un.int/usa/05_068.htm). The text of the Convention can be found at [http://untreaty.un.org/English/Terrorism/English\\_18\\_15.pdf](http://untreaty.un.org/English/Terrorism/English_18_15.pdf).

### ***g. Nuclear Suppliers Group***

At the annual plenary meeting of the Nuclear Suppliers Group ("NSG") held in Oslo, Norway (June 23-34, 2005), the NSG participating governments, including the United States, adopted new measures and policies regarding exports, including the establishment of procedures for "suspending through national decisions nuclear transfers to countries that are non-compliant with their safeguards agreements," a policy that supplier and recipient states should "elaborate appropriate measures to [i]nvoke fall-back safeguards if the IAEA can no longer undertake its Safeguard mandate in a recipient state," and a policy of introducing the "existence of effective export controls in the recipient state as a criterion of supply for nuclear material, equipment and technology and a factor for consideration for dual use items and technologies." The text of an NSG press release describing these measures is available at [www.nuclearsuppliersgroup.org/PRESS/2005-06-oslo.pdf](http://www.nuclearsuppliersgroup.org/PRESS/2005-06-oslo.pdf).

### ***h. Assurances of reliable access to nuclear fuel***

In remarks to the Carnegie International Nonproliferation Conference on November 7, 2005, Under Secretary of State for International Security and Nonproliferation Robert G. Joseph announced an initiative to create a mechanism that would provide assurances of reliable access to the market for nuclear fuel to countries that are willing to refrain from the development of sensitive fuel cycle technologies. The full text of Under Secretary Joseph's speech, excerpted below, is available at [www.state.gov/t/us/rm/56584.htm](http://www.state.gov/t/us/rm/56584.htm).

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In February 2004, at the National Defense University, and in the context of seven proposals to strengthen the NPT regime, the President proposed that the ability to enrich uranium and to reprocess plutonium be limited to those states which already operate such facilities. In return, the President called on the world's nuclear fuel suppliers to assure supply to those states that forego enrichment and reprocessing.

The United States is now working with major supplier states and the IAEA to develop a mechanism for alternative supply arrangements in the event of problems with the commercial market. To enhance those efforts, Secretary Bodman announced that the United States will convert up to 17 metric tons of highly-enriched uranium to low-enriched uranium, and hold it in reserve to support fuel supply assurances. The results of this action will be doubly positive: more assured fuel supply; and a significant reduction in the amount of weapons-related material—enough for almost 700 nuclear warheads. We encourage other supplier states to create such reserves as well.

The U.S. approach to nuclear fuel supply assurances is yet another example of the Bush Administration's effort to bring new vitality to multilateral nonproliferation efforts. For more than three decades, a series of IAEA and UN committees have discussed international fuel cycle issues and the possibility of fuel supply assurances, with no concrete result. The United States now is working instead with the supplier governments, industry and the IAEA—those that can make something happen—to put in place a fuel supply back-up mechanism, drawing on ideas that have been talked about—but only talked about—for more than 30 years.

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### **3. U.S. Legislative and Regulatory Measures**

#### ***a. Executive Order 13382***

As discussed briefly in 2.a. *supra*, on June 28, 2005, the President issued Executive Order 13382 to take additional steps to deal with the national emergency declared in Executive Order 12938 of November 14, 1994, with respect to the proliferation of

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weapons of mass destruction (“WMD”) and the means of delivering them. 70 Fed. Reg. 38,567 (July 1, 2005). Executive Order 13382 was issued in part in response to the recommendations of the independent, bipartisan Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (“Commission”) established by Executive Order 13328 to advise the President on improving U.S. intelligence capabilities, particularly with respect to WMD.

Executive Order 13382 provides a new tool to combat trafficking of WMD and related materials by cutting off finances and other resources that support proliferation networks. Executive Order 13382 blocks the property (within the jurisdiction of the United States) of specially designated WMD proliferators and members of their support networks. U.S. persons and any person or company in the United States are prohibited from engaging in any transaction or dealing with any party designated under E.O. 13382. The action effectively denies designated parties access to the U.S. financial and commercial systems. The E.O. also amends Executive Order 12938 on Proliferation of Weapons of Mass Destruction (1994), as amended by E.O. 13094 (1998). The text of the executive order follows:

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By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, George W. Bush, President of the United States of America, in order to take additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them, and the measures imposed by that order, as expanded by Executive Order 13094 of July 28, 1998, hereby order:

**Section 1.** (a) Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1),

(3), and (4)), or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

- (i) the persons listed in the Annex to this order;
  - (ii) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern;
  - (iii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in paragraph (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; and
  - (iv) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.
- (b) Any transaction or dealing by a United States person or within the United States in property or interests in prop-

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erty blocked pursuant to this order is prohibited, including, but not limited to, (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of, any person whose property and interests in property are blocked pursuant to this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(c) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(d) Any conspiracy formed to violate the prohibitions set forth in this order is prohibited.

**Sec. 2.** For purposes of this order:

(a) the term “person” means an individual or entity;

(b) the term “entity” means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization; and

(c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

**Sec. 3.** I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of, any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 12938, and I hereby prohibit such donations as provided by section 1 of this order.

**Sec. 4.** Section 4(a) of Executive Order 12938, as amended, is further amended to read as follows:

“**Sec. 4. Measures Against Foreign Persons.**

(a) Determination by Secretary of State; Imposition of Measures. Except to the extent provided in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), where applicable, if the Secretary of State,



in consultation with the Secretary of the Treasury, determines that a foreign person, on or after November 16, 1990, the effective date of Executive Order 12735, the predecessor order to Executive Order 12938, has engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer, or use such items, by any person or foreign country of proliferation concern, the measures set forth in subsections (b), (c), and (d) of this section shall be imposed on that foreign person to the extent determined by the Secretary of State, in consultation with the implementing agency and other relevant agencies. Nothing in this section is intended to preclude the imposition on that foreign person of other measures or sanctions available under this order or under other authorities.”

Sec. 5. For those persons whose property and interests in property are blocked pursuant to section 1 of this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 12938, as amended, there need be no prior notice of a listing or termination made pursuant to section 1 of this order.

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Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to determine, subsequent to the issuance of this order, that circumstances no longer warrant the inclusion of a person in the Annex to this order and that the property and interests in property of that person are therefore no longer blocked pursuant to section 1 of this order.

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Sec. 8. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

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The annex to the executive order listed the following entities: Korea Mining Development Trading Corporation, Tanchon Commercial Bank, Korea Ryonbong General Corporation, Aerospace Industries Organization, Shahid Hemmat Industrial Group, Shahid Bakeri Industrial Group, Atomic Energy Organization of Iran, Scientific Studies and Research Center.

The measures authorized to be imposed by the E.O. are administered by the Department of the Treasury Office of Foreign Assets Control. Treasury Secretary John W. Snow issued the following remarks upon the President's signing of E.O. 13382, set forth below in full.

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I applaud President Bush for today issuing the WMD Proliferation Financing Executive Order, aimed at freezing the assets of proliferators of weapons of mass destruction (WMD) and the missiles that carry them.

This Order sends a clear message: if you deal in weapons of mass destruction, you're not going to use the U.S. financial system to bankroll or facilitate your activities.

The Treasury's unique authorities allow us to target the financial underpinnings of a range of national security threats, from terrorism to narcotics traffickers to rogue regimes. By applying these powers against weapons of mass destruction, we deny proliferators and their supporters access to the U.S. financial system and starve them of funds needed to build deadly weapons and threaten innocents around the globe.

Today's Order carries with it an annex that designates eight organizations in North Korea, Iran and Syria responsible for WMD and missile programs. The designation freezes any property the organizations may have under U.S. jurisdiction and prohibits U.S. persons from doing business with them. Today's action is just the

first step in our efforts to dismantle the financial and support networks that facilitate WMD proliferation, and we will continue to designate individuals and entities under this Order found to be playing a role in the proliferation of WMD.

The effectiveness of economic sanctions grows exponentially when they are applied multilaterally. I urge our partners around the globe to put into place similar systems that allow for the freezing of proliferators' assets. We must do all we can to financially isolate those threatening peace and security through the proliferation of WMD.

On October 21, 2005, the Department of the Treasury designated eight additional North Korean entities pursuant to Executive Order 13382 including the Hesong Trading Corporation, Korea Complex Equipment Import Corporation, the Korea International Chemical Joint Venture Company, the Korea Kwangsong Trading Corporation, the Korea Pugang Trading Corporation, the Korea Ryongwang Trading Corporation, the Korea Ryonha Machinery Joint Venture Company, and the Tosong Technology Trading Corporation. *See* Department of the Treasury press release, available at [www.treas.gov/press/releases/js2984.htm](http://www.treas.gov/press/releases/js2984.htm).

***b. Amendments to the Iran Nonproliferation Act of 2000***

On November 22, 2005, President George W. Bush signed into law the Iran Nonproliferation Amendments Act of 2005, which amended the Iran Nonproliferation Act of 2000 (Pub. L. No. 106-178, ("INPA")), to become the Iran and Syria Nonproliferation Act (Pub. L. No. 109-112 ("ISNA")). Generally, the amendments expanded the scope of the Act, and provided that reports to Congress, beginning with the report covering July-December 2005 (due to Congress in March of 2006), on transfers covered by the act, as well as on foreign persons against whom sanctions are authorized, must include not only transfers to Iran of goods and technology as described in the INPA on or after January 1, 1999, but now also these goods and technology acquired from Iran after that date, and also all transfers to or acquisition from Syria on or after January 1, 2005. Moreover, authorized sanctions under

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ISNA may apply additionally to governmental entities, regardless of whether they operate as business enterprises, and entities in which a foreign person against whom sanctions are authorized owns a controlling interest. The INPA was also amended regarding payments to the Russian Government and certain Russian entities in connection with the International Space Station ("ISS") or human space flight, allowing payments for work to be performed or services rendered prior to January 1, 2012 necessary to meet U.S. obligations under agreements relating to the ISS (with reporting requirements for any such payments).

### ***c. Sanctions practice by the United States***

#### ***(1) Missile technology***

On March 17, 2005, a determination was made to extend the waiver of import sanctions against certain activities of the Chinese government as announced on September 19, 2003, pursuant to the Arms Export Control Act. Specifically, it was determined pursuant to section 73(e) of that Act (22 U.S.C. § 2797b(e)) that it "is essential to the national security of the United States to extend the waiver period for an additional six months, effective from the date of expiration of the previous waiver (March 18, 2005)." 70 Fed. Reg. 14,491 (Mar. 22, 2005). *See also* 70 Fed. Reg. 56,205 (Sept. 26, 2005) for further six-month waiver.

#### ***(2) Iran Nonproliferation Act of 2000***

As described above, the Iran Nonproliferation Act of 2000 ("INPA") was amended in 2005 to become known as the Iran and Syria Nonproliferation Act ("ISNA"). Nonetheless, sanctions imposed at the end of 2005 were based on activities of the entities involved prior to the act's amendment, and therefore the determinations and sanctions applied reflected the authorities and standards of the act prior to its amendment. On November 15, 2005 (effective from December 23, 2005), a determination was made that nine entities had engaged in ac-

tivities requiring the imposition of measures pursuant to section 3 of the INPA, which provides for

penalties on entities for the transfer to Iran since January 1, 1999, of equipment and technology controlled under multilateral export control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists, but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists. It was also determined that sanctions imposed on an Indian entity, effective September 23, 2004 (69 FR 4845) are rescinded.

70 Fed. Reg. 77,441 (Dec. 30, 2005). Details from this determination follow.

\* \* \* \*

Pursuant to section 4 of the Iran Nonproliferation Act of 2000 (Pub. L. 106-178), the U.S. Government determined on November 15, 2005 that the sanctions imposed effective September 23, 2004 (69 FR 4845), on the Indian entity Dr. C. Surendar, are rescinded.

Pursuant to sections 2 and 3 of the Act, the U.S. Government also determined that the measures authorized in section 3 of the Act shall apply to the following foreign entities identified in the report submitted pursuant to section 2(a) of the Act:

China Aero-Technology Import and Export Corporation. (CATIC) (China) and any successor, sub-unit, or subsidiary thereof;

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China North Industries Corporation (NORINCO) (China) and any successor, sub-unit, or subsidiary thereof;

Hongdu Aviation Industry Group (HAIG) (China) and any successor, sub-unit, or subsidiary thereof;

LIMMT Metallurgy and Minerals Company Ltd. (China) and any successor, sub-unit, or subsidiary thereof;

Ounion (Asia) International Economic and Technical Cooperation Ltd. (China) and any successor, sub-unit, or subsidiary thereof;

Sabero Organic Chemicals Gujarat Ltd. (India) and any successor, sub-unit, or subsidiary thereof;

Sandhya Organic Chemicals PVT Ltd. (India) and any successor, sub-unit, or subsidiary thereof;

Steyr-Manlicher Gmbh (Austria) and any successor, sub-unit, or subsidiary thereof; and

Zibo Chemet Equipment Company (China) and any successor, sub-unit, or subsidiary thereof.

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on these entities:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;
2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government;
3. No United States Government sales to the foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and,
4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for two years from the effective date, except to the extent that the Secretary of State or Deputy Secretary of State may subsequently determine otherwise. A new determination will be made in the event that circumstances change in such a manner as to warrant a change in the duration of sanctions.

***d. U.S. implementation of measures taken by or consistent with the nonproliferation regimes***

***(1) Australia Group***

On April 14, 2005, the Department of Commerce, Bureau of Industry and Security ("BIS"), published a final rule amending the Export Administration Regulations ("EAR") in several aspects. 70 Fed. Reg. 19,688 (Apr. 14, 2005). The rule amended the EAR to expand the country scope of the chemical/biological ("CB") controls on certain Commerce Control List ("CCL") entries (those containing chemical/biological equipment and related technology on the Australia Group ("AG") Common Control Lists) to require licenses for all destinations worldwide, except for those countries that participate in the Australia Group. It also amended the EAR license requirements to be consistent with the AG "Guidelines for Transfers of Sensitive Chemical or Biological Items." In addition, it expanded the end-user and end-use controls of the EAR to include transfers in country and exports and reexports to or within any country or destination, worldwide. Finally, the rule amended the EAR by expanding the country scope of the restrictions on certain activities of U.S. persons to include activities in support of the design, development, production, stockpiling, or use of chemical or biological weapons in any country or destination, worldwide.

Effective August 5, 2005, BIS issued a final rule amending the EAR "to implement the understandings reached at the April 2005 plenary meeting" of the AG. 70 Fed. Reg. 45,276 (Aug. 5, 2005). The rule amended the EAR to reflect changes to the AG Control List of Dual-Use Chemical Manufacturing

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Facilities and Equipment and Related Technology by revising the CCL with regard to certain pumps that can be used to make chemical weapons or AG-controlled precursor chemicals. The rule also amended the EAR to reflect changes to the AG Control List of Dual-Use Biological Equipment by adding certain components to the CCL entry controlling equipment capable of use in handling biological materials. Moreover, the rule amended the CCL entry (Technical Note) controlling certain genetic elements and genetically modified organisms, consistent with the AG Control Lists on Biological Agents, Animal Pathogens and Plant Pathogens. Finally, the rule amended the EAR to add Ukraine as a participant in the Australia Group and updated the list of countries that are states parties to the Chemical Weapons Convention.

### *(2) Missile Technology Control Regime*

On March 10, 2005, BIS published a final rule amending the EAR (including various entries on the CCL), “to reflect changes to the Missile Technology Control Regimes (MTCR) Annex that were agreed to by MTCR member countries at the October 2004 Plenary in Seoul, South Korea, as well as the plenary decision to allow Bulgaria to become a member of the MTCR.” 70 Fed. Reg. 11,858 (Mar. 10, 2005). Specifically, the rule amended Part 772 of the EAR to revise the definition of “Usable in” or “Capable of” (in the MTCR context) to also include “usable for” and “usable as” in the list of terms defined. Additionally, the rule added four entities located in Syria to the Entity List, a compilation of end-users that “present an unacceptable risk of using or diverting certain items to activities related to weapons of mass destruction.” The rule also revised the missile catch-all controls for Restrictions on Certain Rocket Systems, to clarify that the general prohibition would include a license requirement for items used anywhere except by governmental programs for nuclear weapons delivery of NPT Nuclear Weapons States (that are also members of NATO), in the design, development, production, or use of rocket systems or unmanned air vehicles, regardless of range, for the delivery of chemical, biological, or nuclear weapons.



*(3) Wassenaar Arrangement*

Effective July 15, 2005, BIS issued a final rule making a number of revisions to the CCL, definitions of terms used in the EAR, and Wassenaar reporting requirements in order to implement Wassenaar List revisions agreed upon in the December 2004 Wassenaar Arrangements Plenary Meeting. In addition, the rule amended the EAR to add Slovenia to the list of Wassenaar member countries. 70 Fed. Reg. 41,094 (July 15, 2005).

**Cross References**

*Effect of Armed Conflicts on Treaties, Chapter 4.B.4.*

*Protection of human rights of civilians in armed conflicts, Chapter 6.A.2.*

*Remarks to OSCE on war against terror, Chapter 6.E.2.*

*Use of force issues in discussion of UN reform, Chapter 7.A.1.*

*Responsibility to protect, Chapter 7.A.1.e.(2)(ii).*

*National Strategy for Maritime Security, Chapter 12.A.4.*

*UN Security Council Committee on Non-Proliferation of Weapons of Mass Destruction, Chapter 16.7.a.(2).*



## Table of Cases

*\* An asterisk denotes cases in courts and fora, including the International Court of Justice, other than U.S. Federal and state courts.*

### A

Abdah v. Bush (2005), 1017  
Abu Ali v. Gonzales (2004), 582  
Ackermann v. Levine (1986), 850–52, 856  
Acree v. Republic of Iraq (2005), 507, 509, 544  
Adarand Constructors, Inc. v. Pena (1995), 289  
Af-Cap, Inc. v. Republic of Congo (2004), 558  
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